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No. 92- 92-1934

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

J.M., INDIVIDUALLY,
Petitioner,

- against -

V.C., [redacted],
Respondent.

PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF NEW JERSEY

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QUESTIONS PRESENTED

1. Whether this Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. _, 112 S.Ct. 2791 (1992), or other precedent prohibits the Supreme Court of New Jersey from applying New Jersey Constitutional protections, which extend rights to children prior to birth, to invalidate legislative enactments or executive actions which violate the constitutional rights of children at any age prior to birth?

2. Whether *Planned Parenthood v. Casey*, or other precedent of this Court, prohibits the New Jersey Courts from recognizing the natural father of a child as having requisite standing to prosecute the State and Federal Constitutional rights of his natural child at any time prior to birth (even after "viability")?

3. Whether, in light of the undisputed facts of human development, and the recently acquired scientific evidence of the humanity of the child prior to birth, the actions of the State of New Jersey, through its legislative enactments, executive actions and its courts, which result in the painful dismemberment and death of children prior to birth (even after "viability"), are violative of the natural and inalienable rights of those children and their rights acquired through the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States?

4. Whether it is violative of the natural and inalienable rights of a child or the child's natural father, or the rights of either of them acquired through the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States, for New Jersey to deny either access to court where they seek to litigate the rights of the child through an action prosecuted by the father (where the state fails to protect the child and acts to take the child's life)?

5. When does the life of a child begin?

6. Where a child asserts his or her right to live, does the child's rights, when balanced against a mother's Fourteenth Amendment liberty interest, require the state to protect the child's interest in life at any time from conception to birth under any particular circumstance?

PARTIES TO THE PROCEEDINGS

Petitioner is J.M.,[1] the father of a child whose life he sought to protect through institution of this action, brought in his individual capacity, seeking injunction of an abortion and asserting his right to prosecute the rights of his child as guardian ad litem.

Respondent is V.C., the mother of the child who sought termination of the child's life. The other defendant, W.M.C., never appeared in the action.

[1] The New Jersey courts have ordered the protection of the identity of all parties and the case has proceeded under their initials.

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In The

Supreme Court Of The United States

OCTOBER TERM, 1992

No. 92-

J.M., individually
Petitioner

v.

V.C., *et al.*,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Petitioner, J.M., in his individual capacity, respectfully prays that a Writ of *Certiorari* issue to review the judgment of the Supreme Court of New Jersey entered on March 11, 1993.

ORDERS AND OPINIONS DELIVERED IN THE CASE

The Order of the Chancery Division of the Superior Court of New Jersey dated March 9, 1992 temporarily enjoining V.C. from aborting the child of V.C. and J.M. is found at A-137 to A-142. The Order of the Chancery Division, March 19, continuing the stay but dismissing J.M.'s Individual Complaint on the basis that he had "no standing" to prosecute the rights of his child is at A-171 to A-172. The Orders and opinion of the Appellate Division (two to one vote) dated March 23 dissolving the injunction, but staying it until review by the Supreme Court of New Jersey is at A-173 to A-176. The dissent of Hon. Thomas F. Shebell, J.A.D. is at A-177 to A-

179. The Orders of the Supreme Court of New Jersey, dated March 24, 1992, vacating the restraints are at A-180 to A-181.Upon J.M.'s direct appeal as of right to the Appellate Division, that Court entered an Order dated September 16, 1992 affirming the decision that J.M. had no standing to prosecute the rights of his child. A-188. On appeal as of right to the Supreme Court of New Jersey, that Court entered an Order dated December 8, over the objection of V.C., granting J.M. leave to file an overlength brief and preserving all state and federal constitutional issues [at A-221]. The Orders of the State Supreme Court dated March 9 granting J.M. leave to file overlength and supplemental briefs are at A-222 to A-223. The Final Order (and opinion) of the Supreme Court of New Jersey dated March 9, entered March 11, dismissing the appeal of J.M. on the grounds that *Planned Parenthood v. Casey*, 505 U.S. __, 112 S.Ct. 2791 (1992) controls the questions involved in J.M.'s standing to prosecute the rights of his child, is at A-224 to A-225.

STATEMENT OF JURISDICTION

Petitioner seeks a Writ of Certiorari to review a Final Order of the Supreme Court of New Jersey entered on March 11, 1993. The Petitioner has claimed rights under the Constitution of the

United States, all the issues presented were raised below and the jurisdiction of this Court to review the judgment of the Supreme Court of New Jersey is invoked under 28 U.S.C.A. §1257(a).

STATEMENT OF CONSTITUTIONAL PROVISIONS

This Petition involves the following constitutional provisions:

1. The Fourteenth Amendment Due Process Clause which states: "Nor shall any state deprive any person of life, liberty or property without due process of law." U.S.Const., amend. XIV, §1;

2. The Fourteenth Amendment Equal Protection Clause which states: "Nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, §1.

STATEMENT OF THE CASE

The State of New Jersey authorizes the painful termination of the lives of children prior to birth, even after "viability". Under the New Jersey Constitution, the life of a child begins at conception and the child has a "natural and inalienable" right to live prior to birth. Yet, in this case the Supreme Court of New Jersey erroneously concluded it was precluded by *Planned Parenthood v. Casey*, 505 U.S. __, 112 S.Ct.2791 (1992), to recognize the right of a father to prosecute his child's rights. Further, the Court incorrectly concluded that *Casey* prohibited examination of questions under the Constitution of the United States which have not been determined directly by this Court: when does the life of a child begin, and if the child is a human being prior to birth, does the child possess rights?

This case addresses perhaps the worst governmental deprivation of individual human rights in the history of this nation. It

requires a determination of whether a state has the power to deny natural and inalienable rights from any class of individuals, whether J.M. has standing to prosecute the rights of his child and whether New Jersey's actions which resulted in the painful dismemberment and death of his child, prior to birth, are violative of the Constitution of the United States.

A. Statement of Facts

J.M., 38 years old, met V.C., 32, in July 1991. In September, petitioner first proposed marriage, which V.C. declined. On March 2, 1992, a physician confirmed that V.C. was eight weeks pregnant by (J.M.) (A-82 to A-92). J.M. again proposed marriage, but said he would discharge his obligations as father, whether or not they married or V.C. was able to assist rearing the child. On March 4, V.C. scheduled an abortion for March 11. (A-90 to A-91). After J.M. was unable to persuade V.C. to abandon her plans to terminate the life of the child, he instituted this action on March 9 (A-87 to A-88). J.M. was prepared to raise the child himself, but acknowledged that once the child was born, V.C. may change her mind and decide to be the primary custodian of the child. J.M. certified that he would not interfere with such wishes of V.C. (A-85).

Counsel for V.C. has represented that V.C. obtained an abortion terminating the child's life shortly after the New Jersey Supreme

Court Order of March 24, vacating the injunction. The child was 11 weeks old. In June of 1992, while this case continued in the courts, V.C. became pregnant by J.M. for the second time. When the new baby was ten weeks old gestation, V.C. told J.M. that she had scheduled another abortion (A-228). V.C., however, changed her mind explaining she was convinced that the child would experience pain and she was unable to subject her new baby to a painful death. However, she still believed that it is a mother's "right" to have an abortion and her position in the lawsuit was legally correct (A-228 to A-229).

Thereafter, V.C. told J.M. that she did not wish to communicate with him any longer. When the child was twenty weeks old (after conception) V.C. contacted J.M. to advise him that the baby was healthy, but she was having difficulties. The daily decision to reaffirm that the child would live weighed heavily upon her. V.C. did not want people to know she was pregnant because she did not want anyone to pressure her. V.C. refused to communicate with J.M. for periods of time. J.M. felt particularly helpless to protect this child because New Jersey had ruled that he had no "standing" to prosecute the rights of the child and New Jersey authorizes post-"viability" abortions (A-229 to A-231).

The record contains compelling testimony and extensive scientific and medical analysis concerning new knowledge of science, technology and medicine which supports three pertinent conclusions: (1) the life of a person begins at conception when the individual is a complete, separate human being; (2) the individual is complete even as to a unique identity at conception; and (3) there is new scientific evidence which demonstrates that the child experiences pain as early as eight weeks after conception (A-304 to A-358; A-270 to A-272).

B. Procedural History

J.M. instituted this action in the Superior Court of New Jersey on March 9, 1992 seeking to enjoin V.C. from terminating the life of their child (Complaint, A-72 to A-80). He brought the action on behalf of himself, asserting his right to defend the life of his child and his right to act as guardian ad litem (to prosecute his child's rights). The Chancery Court enjoined the abortion until a return date of March 30 (A-137 to A-142). On March 13, the Appellate Division directed the parties and the lower court to proceed using only the initials of the parties (A-143). On March 19 the Lower Court granted V.C.'s motion to dismiss the Complaint brought by J.M. individually, ruling that J.M. did not possess "standing" and

had no right to be guardian ad litem (and "prosecute" the child's rights). The Court alluded to J.M. as a "busy body" who has "no standing to prosecute this action." (A-146 to A-166; see Order dismissing J.M.'s claim individually, A-168 to A-169).

The Court continued the injunction because it did not dismiss the complaint of the child. J.M. filed a timely Notice of Appeal in the Appellate Division, which affirmed the Order of Dismissal of the Chancery Division on September 16 (A-185), while granting J.M.'s motion to supplement the record (A-186). Petitioner filed a timely Notice of Appeal in the New Jersey Supreme Court on November 4, 1992 (A-201 to A-211).[1] On November 18, 1992 J.M., individually, filed a motion with the New Jersey Supreme Court seeking leave to file an overlength brief of 144 pages and appendices containing legal and scientific authorities. V.C. vigorously opposed the motion, seeking to preclude much of J.M.'s legal argument. J.M.'s motion was granted by the Court on December

[1] Before that Notice of Appeal was filed by J.M., individually, the child's case had been completely litigated in all courts. Having proceeded separately, on March 24, 1992, when the injunction was vacated by the Supreme Court, a final Order was entered in the child's case (A-177 to A-178) (procedure in the child's case is at A-276 to A-281).

8 (A-218) authorizing the filing of the brief previously lodged with the Court. That brief, preserving all issues, is at A-239 to A-459.

V.C. moved to dismiss the appeal on the basis of *Planned Parenthood v. Casey, supra*. The Court granted J.M. leave to file overlength and supplemental briefs on the motion (A-219 to A-220), and dismissed the appeal on the grounds that *Casey* "governed" the case (A-221 to A-222). Dozens of organizations from this country and other nations were seeking leave to be heard in the case (see, e.g., A-223) and international figures were in the process of urging the Court to fully examine the issues.[2] It is clear that the New Jersey Supreme Court concluded the issues presented by this case could only be decided by this Court.

C. Justiciability

Although the child's life has been terminated, this case presents a justiciable controversy, because V.C. was pregnant at the time the complaint was filed. *Roe v. Wade*, 410 U.S. 113, 124-125 (1973). Pregnancy litigation provides a classic justification for a conclusion of non-mootness because it truly presents a situation that is "capable of repetition, yet evading review." *Roe*, 410 U.S.

[2] Mother Teresa of Calcutta executed a Certification to be submitted to the court. A copy of that Certification, unfiled because the New Jersey Supreme Court felt it was bound by *Casey*, is found at A-230 to A-233.

at 124. The plaintiff in *Roe* was not pregnant at the time of the trial in May of 1970, almost three years before the Supreme Court issued its opinion. *Roe*, 410 U.S. at 127. *Roe* observed:

> if...termination (of pregnancy) makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage and appellate review will be effectively denied. 410 U.S. at 125.

This rule applies here, or *Roe* itself could never be effectively reviewed.[3] V.C. has never contested this point in this case.

J.M. litigates the rights of the child, and his right to defend the child at all ages, from conception to birth. This Court has jurisdiction over issues relating to the entire nine months of pregnancy. The majority in *Roe* created very precise rules of law governing all stages of the child's development despite the fact that the pregnancy in *Roe* terminated only two months after the complaint was filed. The majority rejected the reasoning of the dissent that the Court should not review all nine months of the pregnancy because the mother was pregnant for only two months during the litigation. *Roe*, 410 U.S. at 171-172 (Rehnquist, C.J. dissenting). In addition, post-viability abortions were directly implicated in this case during the second pregnancy. Because of

[3] It is consistent with New Jersey law. *Matter of Conroy*, 464 A.2d 303, 306 (App.Div.1983), aff'd on this point, 486 A.2d 1209 (1985).a

the clear state action (see A-441 to A-452), the quality of the record, and the fact that this case directly presents questions never before decided by this Court, it is the best opportunity for this Court to decide the substantial questions it presents.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

In this case one parent acted in the best interest of his child while the other sought the child's painful dismemberment and death. The State of New Jersey acted to assist in the termination of the child's life. The Supreme Court of New Jersey ruled that it was powerless to protect the child's right to live, concluding: [1] it was irrelevant whether the child was a human being who experiences pain (A-177); and [2] it was precluded by *Casey* from recognizing a father's right to prosecute the rights of his child (A-221 to A-222). Both of these conclusions are wrong, resulting in the gravest deprivation of individual rights (before and after "viability"). This injustice is the product of the *Roe* Court's failure to directly decide the question of when the life of a human being begins, and whether, recognizing that a child is a human being prior to birth, these children have constitutional rights.

I. RECENT SCIENTIFIC, MEDICAL AND TECHNOLOGICAL ADVANCES AND DISCOVERIES PROVIDE A LARGE BODY OF NEW FACTUAL DATA WHICH DEMONSTRATE THAT: (1) THE CHILD EXPERIENCES PAIN PRIOR TO BIRTH EVEN IN THE

VERY EARLY STAGES OF DEVELOPMENT AND (2) THE LIFE OF A HUMAN BEING BEGINS AT CONCEPTION. THERE IS A CONSENSUS WITHIN THE SCIENTIFIC AND MEDICAL COMMUNITIES CONCERNING THE BIOLOGICAL AND GENETIC FACTS WHICH SUPPORT THE CONCLUSION THAT THE LIFE OF A PERSON BEGINS AT CONCEPTION. THESE FACTS REQUIRE A REEXAMINATION OF THE LEGAL QUESTION OF WHETHER A CHILD HAS RIGHTS PRIOR TO BIRTH.

A. THE RELEVANCE OF THE FACTS AND NEW TECHNOLOGIES.

The legal conclusion that the child enjoys constitutional rights prior to birth and J.M. has standing to prosecute them rests upon the fact that the child's life begins prior to birth, and the child is a complete, separate and unique human being from conception, who experiences pain at early stages of development. The question of whether the child enjoys rights before birth but after viability is a state question essentially free of federal restraint. *Roe*, 410 U.S. at 164; *Casey*, 112 S.Ct. at 2804. Yet, New Jersey specifically authorizes medical procedures designed to terminate the life of a child at all times up to the moment of birth. This state action is in direct violation of both New Jersey and U.S. Constitutions (see A-358 to A-374).[4]

[4] In 1978 New Jersey repealed N.J.S.A. 2A:87-1 which made abortion a high misdemeanor, removing all prohibition against a mother seeking to take the life of her child. New Jersey licenses and regulates doctors and hospitals through its Board of Medical Examiners. New Jersey's Administrative Code states that only a physician licensed by the state may perform an abortion. Reg. of Bd. of Med. Exam. 13:35-42(b) (A-234 to A-238).

1. The Inability of the *Roe* Court to Reach a Conclusion on the Factual Component of the Inquiry Before it Lead to a Wholly Different Legal Analysis than that Required if the Court Found, as a Matter of Fact, that Life Begins at Conception or Prior to Birth.

The whole basis for the *Roe* decision was the premise that in 1973 it was not possible to determine when life began (so the child had no rights):

> (1) We need not resolve the difficult question of when life begins. ...the judiciary, *at this point in the development of man's knowledge*, is not in a position to speculate as to the answer" 410 U.S. at 159 (emphasis added); and [therefore] (2)...The word 'person', as used in the Fourteenth Amendment, does not include the unborn. 410 U.S. at 158.

Roe is the only case in which the United States Supreme Court reviewed that issue.[5] Significant recent developments and discoveries in science and medicine require a re-examination of Sections IX(A) and IX(B) of *Roe*, 410 U.S. at 156-162, which impliedly promised that the Court would do so when "man's knowledge" is sufficient. If the *Roe* Court had the benefit of man's

The Board specifically authorizes abortions any time prior to birth. Even between 20 weeks gestation and birth the only limitations placed upon an abortion is that the doctor must request from the State Board permission to perform a "D and E" procedure [always fatal to the child (s*See, Planned Par., Kansas City v. Ashcroft*, 462 U.S. 476, 483 (1983)] in a licensed ambulatory care facility. N.J.A.C. 13:35-4.2(g) (A-237). The physician, in order to obtain such permission, need only show he or she has the proper training. The state has created rules by which it literally licenses individuals to take the life of a child any time prior to actual birth (see A-441 to A-452).

[5] *Casey* reexamined *Roe* but did not review Sections IX(A) and IX(B) of *Roe* dealing with the question of the child's rights.

current knowledge it would have had to conclude that the life of a human being begins at conception, and a child is capable of experiencing pain as early as eight weeks gestation.[6] Because the *Roe* Court did not determine when the life of a child began, its legal analysis was very different from, and quite irrelevant to, the one the Court must do once it is found that the child is a human being prior to birth. Because of this inability, *Roe* ignored applicable principles of constitutional interpretation [see, IIA2 below].

The *Roe* Court found that it was "persuaded" that the word "person" "as used in the Fourteenth Amendment" did not include the "unborn." 410 U.S. at 158. To reach this conclusion *Roe* relied upon a review of those clauses in which the word "person" appeared. This approach is irrelevant when it is recognized that life begins at conception (or any time before birth). For one thing, it ignores the Equal Protection Clause. To determine the class of persons protected by the Due Process Clause the Court would have been required to construe that clause in *pari materia* with the Equal Protection Clause (both part of section one of the Fourteenth Amendment, ratified in 1868). The Equal Protection Clause forbids

[6] See IB below; A-304 to A-358; Appendix B at A-19 to A-30.

denial to "any person within its jurisdiction" the equal protection of the laws. If the word "person" as used in the Equal Protection Clause (and therefore the due process clause) could contain classes of "persons" so that the clause would apply to some but not to others, it would constitute an inherent contradiction rendering the Equal Protection Clause meaningless. Therefore, any construction of "person" in the Due Process Clause can only be conducted simultaneously with *Roe's* inquiry under Section IX(B), when the life of a human being begins (see, IIA2 below).

Roe also ignored prior precedent of the Court which found that a corporation was a "person" which enjoys liberty rights under the Fourteenth Amendment. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). *Grosjean* is relevant in three separate ways. First, a corporation no more meets the *Roe* test for a "person" than does a child prior to birth.[7] Second, *Grosjean* has precedential value on the issue of *stare decisis* to overrule *Roe*.[8] Third, *Grosjean* specifi-

[7] The difference was that the Court in *Grosjean* had to acknowledge the existence of a corporation, where the *Roe* Court said it could not determine the existence of the child. "Existence" becomes the most pertinent question. No theory of individual rights could justify inclusion of the legal fiction of a corporation as a "person" and deny the same right to any class of human beings.

[8] *Grosjean* construed the same word ("person") in the same Due Process Clause and overruled prior cases which excluded corporations as "persons" who enjoyed liberty interests. *See, Northwestern Life Insurance Co. v. Riggs*, 203 U.S. 243,

cally found that a corporation, although it was not a person under the citizenship clause contained in the first sentence of the amendment because it was not "born" or "naturalized", was a "person" which enjoyed rights under the Due Process Clause.[9]

2. The Question of the Child's Rights is the Sort of Mixed Question of Fact and Law Which, By Accepted Principles of *Stare Decisis*, Requires Overruling Prior Precedent When New Facts, or New Appreciation of Old Ones, Demonstrate that Prior Precedent Erroneously Applied Constitutional Principles.

Stare decisis is not a bar to the reexamination of *Roe* when new facts, or new appreciation of old ones, require it.[10] Of particular

355 (1907); *Western Turf Association v. Greenberg*, 204 U.S. 359, 363; *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). It is precedent which expanded the class of "persons" to whom the Due Process Clause applies.

[9] Obviously, construction of "person" in one clause is not necessarily relevant to another. Birth, therefore, is not a requirement of persons under the due process clause. *Roe* therefore creates a tragic contradiction: corporations, created by government, cannot be denied due process; individual human beings, owing nothing to government for their existence and for whose protection government was created, are denied the unalienable right to live. Once the child's humanity is determined, Roe's analysis is irrelvant [see IIA2-4 below].

[10] There are at least one hundred and seventy-four instances in which the United States Supreme Court has overruled, in whole or in part, its previous decisions. The present compilation of the 174 cases noted is based primarily upon the following authoritative sources: Justice Brandeis, dissenting in *Burnet v. Coronado Oil and Gas Co.*, 285 U.S. 393, 406-409 n1 (1932); *Annette E. Wilson, "Stare Decisis" Quo Vadis?*, 33 Geo. L.J. 251, 254 n. 17 (1945); William O. Douglas, "stare decisis," 49 Colum. L.Rev. 735-743, 756-758(1949); Albert R. Blaustein and Andrew H. Field, Overruling Opinions in the Supreme Court, 57 Mich. L.Rev. 151, 184-194(1958); The Constitution of the United States of America: Analysis and Interpretation, 1317-18, Lester S. Jayson, et al. ed. (1973). *Payne v. Tennessee* (Marshal, J., dissenting) 111 S.Ct. 2597, 2610, 2611 n.1 (1991). For the complete list of cases, see Appendix A at A-1 to A-18.

relevance is the often cited statement of Justice Brandeis[11] contained in his dissenting opinion in *Burnet v. Coronado Oil and Gas Co.*, 285 U.S. 393, 405-413:

> The reasons why this court should refuse to follow an earlier constitutional decision which it deems erroneous are particularly strong where the question presented is one of applying, as distinguished from what may accurately be called interpreting, the Constitution...The controversy is usually over the application to existing conditions of some well recognized constitutional limitation. This is strikingly true of cases under the due process clause when the question is whether a statute is unreasonable, arbitrary or capricious; of cases under the equal protection clause when a question is whether there is any reasonable basis for the classification made by a statute; .. In every such case the decision, in the first instance, is dependent upon the determination of what in legal parlance is called a fact, as distinguished from the declaration of a rule of law. When the underlying fact has been found, the legal result follows inevitably. The circumstances that the decision of that fact is made by a court instead of by a jury, should not be allowed to obscure its real character. 285 U.S. at 410-411.

Whether a child before birth is a person to whom the Fourteenth Amendment applies is a mixed question of fact and law, precisely the type of determination to which Justice Brandeis refers. In reaffirming that portion of *Roe* which found that the Due Process Clause of the Fourteenth Amendment "is broad enough to encompass a woman's decision whether or not to terminate her preg-

[11] The Brandeis opinion has been frequently cited with approval. See *Solario v. U.S.*, 483 U.S. 435, 450 (1987) (expressly overruling *O'Callahan v. Parker*, 395 U.S. 250 (1969); *United States v. Scott*, 437 U.S. 82, 101 (1978); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (Blackmun, J., dissenting).

nancy," the Court in *Casey* expressly declined to state that *Roe* was correctly decided either on constitutional principles[12] or moral grounds,[13] and articulated a reluctance to do so.[14] The Court, not being able to affirm either *Roe's* correctness or its morality, affirmed *Roe* based upon *stare decisis* and special considerations because of a divisive national debate. Whether the principles outlined in *Casey* operate as a bar to overturning the mother's rights found in *Roe*, they clearly are not a bar in the J.M. case on the question of the child's rights.[15]

[12] "We do not need to say whether each of us, had we been Members of the Court when the valuation of the State interest came before it as an original matter, would have concluded, as the *Roe* Court did, that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions. The matter is not before us in the first instance, and coming as it does after nearly twenty years of litigation in *Roe's* wake we are satisfied that the immediate question is not the soundness of *Roe's* resolution of the issue, but the precedental force that must be accorded to its holding." *Casey*, 505 U.S. , 112 S.Ct. at 2817.

[13] "Some of us as individuals find abortion offensive to our most basic principles of morality,..." *Casey*, 112 S.Ct. at 2806.

[14] *Casey*, 112 S.Ct. at 2812.

[15] Two critical distinctions made by Justice Brandeis apply here. First, where the Due Process Clause has been erroneously applied (as opposed to erroneously interpreted), overruling the prior decision is more easily justified. That principle has application here because the problem is not one of interpretation (clearly the Due Process Clause textually affirms the right to life of all persons), but rather one of applying a recognized right to specific circumstance. Secondly, Justice Brandeis distinguishes those legal questions which are by their nature mixed questions of fact and law. The legal question of whether the unborn child enjoys constitutional rights is such a question.

B. RECENT SCIENTIFIC, MEDICAL AND TECHNOLOGICAL ADVANCES AND DISCOVERIES PROVIDE A LARGE BODY OF NEW FACTUAL INFORMATION WHICH DEMONSTRATES THAT: (1) THE LIFE OF A HUMAN BEING BEGINS AT CONCEPTION AND (2) THE CHILD EXPERIENCES PAIN DURING ABORTIONS IN THE EARLY STAGES OF DEVELOPMENT. THERE IS A CONSENSUS WITHIN SCIENCE AND MEDICINE CONCERNING THE CRITICAL BIOLOGICAL AND GENETIC FACTS WHICH SUPPORT THE CONCLUSION THAT THE LIFE OF A PERSON BEGINS AT CONCEPTION.

1. The Exploding Revolution of Molecular Biology Has Changed Man's Knowledge of Developmental Neurology.

Biologically, human beings are made up of molecular building blocks. Their development is controlled by the genetic material DNA and RNA which contain instructions carried out by the synthesis and functioning of proteins. In 1973 most of our knowledge concerning human identity and development before birth was based upon gross morphological observations and biochemical studies on often heroic quantities of material. Since *Roe*, there have been many scientific, medical and technological advances and discoveries,[16] many in the last five years. The results point out

[16] Including: (1) Recombinant DNA Technology (allows the production of a large amount of specific pieces of DNA which assists in DNA probe research); (2) DNA Probe Technology (use of pieces of DNA that are radioactively labeled to find a piece of DNA or RNA that is related in sequence); (3) Southern Blot (combines the separation of molecules by electric charge and size with DNA probe technology); (4) Northern Blot (combines the separation of molecules by electric charge and size along with RNA probe technology for DNA); (5) DNA Mapping (process by which a map is made with guide posts of the DNA available in a particular sample (including chromosomes)); often accomplished by cutting the DNA molecule into pieces and then determining from where the pieces were derived); (6) DNA Finger

ignorance, errors of fact and judgment concerning the scientific

Printing (a procedure whereby DNA probes to minisatellite regions of human DNA are used to provide a complex Southern Blot pattern; provides a test for relatedness between samples of DNA; used with PCR such comparisons can be done on as little as one cell from each source; (7) Polymerase Chain Reaction (PCR) (a test-tube method of amplifying DNA sequences to billions of times invented in late 1984 used to obtain information from a single cell); (8) Monoclonal Anti-Body Technology (antibody preparation which contains only single type of antibody molecule); (9) Hybridona Technique (used to produce human specific antibodies; detects human proteins or peptides); (10) Flow Cytometry (cells in suspension, often marked with fluorescent monoclonal antibodies are intercepted by a beam of light; produces signals which drive a cell sorting apparatus which sorts and counts cells based upon a desired property - used to completely remap the nervous system and for prenatal diagnosis with fetal cells isolated from maternal blood); (11) Improved Ultrasound Technology (permits observation of the fetus at early ages of gestation); (12) DNA Methylation (modification of DNA so that it is recognized as different); (13) Fetal Heart Monitoring (observes the operation of the human heart of the fetus at early stages of development); (14) Advances in electroence photography which improve detection of signals of brain activity; (15) DNA cloning (application of DNA techniques to prenatal diagnosis of certain single gene disorders introduced in 1976; DNA-based tests first applied for prenatal diagnosis of alpha-Thalassemia, 1978, sickle cell anemia, 1978, beta-thalassemia, 1980, hemophilia A, 1985, hemophilia B, 1984, phenylketonuria, 1985, Duchenne and Becker muscular dystrophy, 1985, cystic fibrosis, 1986, and Huntington's disease, 1986. Boehm, C.D., et als., "Prenatal Diagnosis by DNA Analysis" In *The Unborn Patient* 2nd ed., edited by Michael R. Harrison et al., 82-91 at 82. Philadelphia: W.B. Saunders Company, (1991)); and (16) the use of restriction endonuclease enzymes Martinis, J.; et als., "Novel Applications of Monoclonal Antibodes." In *Basic Biology of New Development* In *Biotechnology In Basic Life Sciences* 25(1983): 129-154, at p. 129-130. Cole, S.C.P., et als., "Human Monoclonal Antibodies." *Mol Cell Biochem* 62 (1984): 109-120, at p. 109; Watson, J.D., et als., *Recombinant DNA: A Short Course*. San Francisco: W.H. Freman, 1983; Campbell, A.M. "Monoclonal Antibody Technology" In *Laboratory Techniques and Biochemistry and Molecular Biology*, edited by R.H. Burdon and P.H. Van Knippenberg. Eisevier (Amsterdam), 1985; Arnheim, N., et als., "Polymerase Chain Reaction." *Chemical & Engineering News* (Oct. 1990): 36-47, at p. 36. White, T.J., et als., "The Polymerase Chain Reaction." *Trends Genet* 5(1989): 185-189, at p. 185. Arnheim, N., et als., "Application of PCR: "Organismal and Population Biology." *Bioscience* 40(1990):174-182, at p. 174; Holding, C., et als., "Diagnosis of Beta-Thalassaemia by DNA Amplification in Single Blastomeres from Mouse Preimplantation Embryos." *Lancet* II (1989): 532-535. Handyside, A.H., et als., "Biopsy of Human Preimplantation Embryos and Sexing by DNA Amplification." *Lancet* I (1989):347-349. See, Appenidix at A-304 to A-358.

understanding of the child's existence as a unique human being, early development, ability to react to its environment and to feel pain prior to birth. These techniques permit scientists to observe human existence and development at a molecular level, applicable in determining genetic uniqueness, genetic diseases, sex and paternity through the analysis of human genes well in advance of gross anatomical observation.

2. The Life of Each Person Begins at Conception.

(a) Recent Developments in Science Support the Conclusion that the Life of a Human Being begins at Conception.

All of the genetic information and material necessary for the complete development of a unique human being is present at the moment human life begins at conception, when the head of the male sperm penetrates inside the female's ovum. The child is a complete human being for life from conception and the essence of the human being is complete.[17]

[17] See, A-310 to 314; A-96 to A-100; there is a consensus on the facts which form the basis for this conclusion. See authorities cited in Appendix B at A-19 following petition; see also, Moore, K.L., *Before We Are Born*, W.B. Saunders (1989) p.25, 26; Gilbert, S.F., *Developmental Biology*, Sinauer Ass. Inc., 1985, p.32-37, 58-63; Volpe, E.P., *Seeds of Life, In Biology and Human Concerns* (1983), Stout, J., 3rd Ed. Wm. C. Brown Co., p.18-20; Gilbert, S.F., *Developmental Biology*, Sinauer Ass. Inc., 1985, p.32-37, 58-63; Oppenheimer, S.B., et al. *Introduction to Embryonic Development*, 1989, Allyn and Bacon; Editorial Production Service, Lifland, et al. Bookmakers, p.20-60; Bernstein, R. et al. *Biology: The Study of Life* (1982), Harcorth, Brace, Jocvanovick, Inc. p. 584; Harlock E.B. Child Development 6th ed. McGraw-Hill, Inc. 1978 p. 53-54; Goin, O.B. *Man and the Natural World* 2nd ed. New York: Macmillan Publishing Co.,

Methylation of cytosine is a recent discovery which supports this conclusion. It's significance was unknown four or five years ago: DNA is even more sophisticated than previously suspected and its messages are written letter by letter, piece by piece. Everything to allow development of a particular human being exists at fertilization but is not read at the instant of conception. This discovery was neither expected nor predicted ten years ago. The female information acting in concert with the male information, provides the mechanism for the development of the parts of the physical anatomy.[18] This information and sophisticated directed mechanisms is contained in the first cell.[19] At each stage of development this methylation is erased and replaced and pro-

Inc., 1975 p. 183; Clark J. ed. *The Nervous System: Circuits of Communication In The Human Body*. Torstar Books, Inc., 1985, p. 99. Volpe, E.P. Biology and Human Concerns, 3rd ed. Wm. C. Brown Co. 1983, p. 20.

[18] LeJeune at A-101 to A-103. Chaillet, J.R., et als. "Parental-Specific Methylation of an Imprinted Transgene is Established During Gamestogenesis and Progressively Changes During Embryogenesis." *Cell* 66(1991): 77-83. Surani, M.A.H., et als., "Nuclear Transplantation in the Mouse: Heritable Differences Between Paternal Genomes after Activation of the Embryotic Genome." *Cell* 45(1986): 127-136. Swain, J.L., et als. "Parental Legacy Determines Methylation and Expression of a Cutosomal Transgene; A Molecular Mechanism for Paternal Imprinting." *Cell* 50(1987):719-727, at p. 719.

[19] It is absolutely required that in the first cell, there be both the DNA underlined by methylation in the male way and DNA methylation in the female way. The extraordinary observation is that this is the only cell in all of the life of a person in which those two methylation systems are present inside a cell unaltered.

gressively cells learn by a cascade of reaction to specialize so that some cells will develop to form the brain, another to make the liver, etc. It has been determined for instance, that the male way of "spelling" is obligatory for muscles, so that, even in the female, information from which muscles are built needs to be underlined in the male way. This understanding contradicts previous notions that fetal development occurs only through the mother. The child is programmed for life from conception.[20]

Approximately seven years ago Alec Jeffreys discovered and developed a technique which can determine the identity of a particular human being by using a region of a person's DNA to make a genetic "fingerprint." Much like a bar code in a store uniquely identifies a thing, this fingerprint uniquely identifies an individual and can be "read."[21] The Jeffreys technique has been

[20] LeJeune at A-101 to A-103. Chaillet, J.R., et als. "Parental-Specific Methylation of an Imprinted Transgene is Established During Gamestogenesis and Progressively Changes During Embryogenesis." *Cell* 66(1991): 77-83. Surani, M.A.H., et als., "Nuclear Transplantation in the Mouse: Heritable Differences Between Paternal Genomes after Activation of the Embryotic Genome." *Cell* 45(1986): 127-136. Swain, J.L., et als., "Parental Legacy Determines Methylation and Expression of a Cutosomal Transgene; A Molecular Mechanism for Paternal Imprinting." *Cell* 50(1987):719-727, at p. 719.

[21] LeJeune at A-101 to A-102; Jeffreys, et al. ***DNA Fingerprints and Segregation Analysis of Multiple Markers in Human Pedigrees***, Am. Jour. of Hum. Gen., 39:11-24 (1986); Honma, M., et al. ***Application of DNA Fingerprinting to Parentage and Extended Family Relationship Testing***, Human heredity, 1990, 40:p356-362; Jeffreys, A.J., et al., ***Principles and Recent Advances of Human***

applied to determine if two samples containing genetic material (DNA) are from the same person.[22] The field of DNA fingerprinting as applied in court cases is the direct result of this technology.[23] The techniques of fetal cell intrusion, prenatal diagnosis of disease, villus sampling, in vitro fertilization, and sexing of preimplanted embryos also establish the existence of a unique human being early in gestation.[24] Using modern molecular biology technology, it has been found that by the third cell division

DNA Fingerprinting; DNA Fingerprinting: Approaches and Applications, (1991).

[22] Jeffreys, A.J., et als., "Positive Identification of an Immigration Test-Case Using Human DNA Fingerprints." *Nature* 317 (1985):818-819, at pp. 818-819.

[23] Honma, M.; and Ishiyama, I. "Application of DNA Fingerprinting to Parentage and Extended Family Relationship Testing." *Hum Hered* 40(1990): 356-362, at p. 356. The technique has been successful in establishing paternity of the developing child at 9 weeks gestation, with a certainty of 360 trillion to one. Kovacs, B.W., et als., "Prenatal Determinations of Paternity by Molecular Genetic "Fingerprinting." *Obstet Gynecol* 75(1990): 474-478, at pp. 474-475. The procedure established the existence of a unique human being at the time of the tests.

[24] Price, J.O., et als. "Prenatal Diagnosis with Fetal Cells Isolated From Maternal Blood by Multiparameter Flow Cymetry" *Am J Obstet Gynecol* 165(1990): 1731-1737, at p. 1731; Oppenheimer, S.B.; and Lefeure, G. Jr. *Introduction to Embryonic Development* Allyn and Bacon 1989. (pp. 20-60) at p. 53. Papalia, D.E., et als., *A Child's World: Infancy Through Adolescence*. New York: McGraw-Hill, Inc., 1979, at p. 51; Hogge, W. A. "Chorionic Villus Sampling" In *The Unborn Patient* 2nd ed. edited by M.R. Harrison et al., 53-57. Philadelphia: W.B. Saunders Co., 1991, at p. 53; Boehm, C.D. and Kazazian, H.H. Jr., "Prenatal Diagnosis by DNA Analysis" In *The Unborn Patient* 2nd ed., Harrison et al., 82-91 at 82. Philadelphia: W.B. Saunders Company, (1991); Handyside, A.H., et als. 1989 "Biopsy of Human Preimplantation Embryos and Sexing by DNA Amplification." *Lancet* I (1989):347-349, at p. 348; Monk, M.; and Holding, C. "Amplification of a Beta-Haemoglobin Sequence in Individual Human Oocytes and Polar Bodies." *Lancet* 335(1990): 885-987, at 985.[24]

after fertilization control of growth and development has been established by the new human's DNA.[25]

(b) There is a Consensus within the Scientific and Medical Communities Concerning the Biological Facts which Support the Conclusion that Life begins at Conception.

Respondent relies upon an affidavit of one Michael V.L. Bennett to support her contention that there is no consensus that life begins at conception (A-190 to A-198). The affidavit relies upon testimony of Dr. Leon Rosenberg given in 1981 before the Subcommittee on Separation of Powers of the Judiciary Committee of the U.S. Senate (Human Life Bill, S. 158, 97th Cong., 1st Sess.) (A-191 to A-192). The subcommittee, however, before whom Dr. Rosenberg testified, published a report which specifically found, as a matter of scientific fact, that human life begins at conception:

> The testimony of these witnesses and the voluminous submissions received by the subcommittee demonstrate that contemporary scientific evidence points to a clear conclusion: life of a human being begins at conception...today the facts are beyond dispute.Physicians, biologists, and other scientists agree that conception marks the beginning of the life of a human being ... there is overwhelming agreement on this point in countless medical, biological, and scientific writings. *Report on Human Life Bill*, Subcommittee on Separation of Powers, Committee on the Judiciary United States Senate (97th Cong., 1st Sess. 1981) p. 7.

[25] Telford, N.A.; Watson, A.J.; and Schultz, G.A. "Transition From Maternal to Embryonic Control in Early Manmalian Development: A Comparison of Several Species." Molecular Reproduction and Development 26(1990): 90-100, at 92.

Further, the report singled out Dr. Rosenberg for comment:

> It may at first seem difficult to reconcile how the existence of such a broad consensus with the testimony of some witnesses opposing S-158 ... who emphatically denied that it is possible to determine when a human life begins. If the facts are so clear, it is crucial to understand how, for example, one like (Dr. Leon Rosenberg) could say that he knows of no scientific evidence that shows when actual human life exists. ...Such statements appear on the surface to present a direct contradiction to the biological evidence discussed above. The explanation of this apparent contradiction lies in existence of the two distinct questions..., the scientific question and the value question. We must consider not only whether unborn children are human beings, but also whether to accord their lives intrinsic worth and value equal to those of other human beings. ...It is a scientific question whether an unborn child is a human being, in the sense of a living member of the human species. It is a value question whether the life of an unborn child has intrinsic worth and equal value with other human beings. ...Those witnesses who testified that science cannot say whether unborn children are human beings were speaking in every instance to the value question rather than the scientific question. No witness raised any evidence to refute the biological fact that from the moment of human conception there exists a distinct individual being who is alive and is of the human species. No witness challenged the scientific consensus that unborn children are 'human beings', insofar as the term is used to mean living beings of the human species. Report on Human Life Bill, *supra*, at 10, 11.

The Subcommittee found Dr. Rosenberg adopted an untruthful approach by claiming that whether the child is a person is a matter of definition, not a question of fact, and "person" can be defined any way one wishes. Only by disregarding the facts could Dr. Rosenberg state that he "knows of no scientific evidence showing

when actual human life exists," and "he was speaking only to the value questions ..." Report, *supra* at 11, 12.[26]

3. The Child Can Experience Pain as Early as Eight Weeks After Conception.

Dr. Bernard Nathanson testified that in his opinion the child experiences excruciating pain during abortion. A vivid description which he claims supports this conclusion is found in a film of an actual abortion made in 1984. The baby is seen moving away from the suction apparatus and then the arms and legs of the child are torn off. The mouth of the baby is open, the child is grimacing and evidencing pain. (see A-126 to A-128). Recent discoveries now provide scientific evidence of this contention. With the use of monoclonal antibody technology[27], and electrophysiologoy scientists could investigate nervous system function and development at the molecular level. We now know that the classical histological and functional criteria for defining (nerve) cell types was

[26] The petitioner is unable to find a single modern reference in the scientific literature which refutes the statement that humans are genetically distinct and complete from their parents at the moment of conception. The scientific literature is replete with clear statements that human life begins at conception. Petitioner compiled a partial list of quotations from scientific and medical journals that make the clear statement that life begins at conception."Appendix B," at A-19 to A-30.

[27] Campbell, A.M. "Monoclonal Antibody Technology" In *Laboratory Techniques and Biochemistry and Molecular Biology*, edited by R.H. Burdon and P.H. Van Knippenberg. Eisevier (Amsterdam), 1985

oversimplified.[28] One outstanding discovery, first described in 1985,[29] was the detection of some 30 neuropeptides (or nerve hormones) directly involved in the functioning nervous system of the human body. Neuropeptides function as neurotransmitters and neuromodulators which are located at axon terminals at synapses throughout human tissue. Two of them are of particular relevance are substance P (the chemical messenger of pain) and enkephalin (a neurotransmitter involved in pain perception).[30] The detection of these two neuropeptides in samples of human tissue has been used to define and locate nervous system development and function in the human being. The results point to a complex process of interacting peptides, neurons, and ion channels which play an important role in the detection and transmission of sensation in the human.

[28] Fischbach, G.D. "An Introduction to Molecular Approaches in Studies of Neuronal Development and Synapse Formation." In *Molecular Neurobiology* In *Neurology and Psychiatry*, edited by M.D. Erich, R. Kandel. New York: Raven Press, 1987.

[29] Ballesta, J.; Bloom, S.R.; and Polak, J.M. "Distribution and Localization of Regulatory Peptides." *Crit Rev Clin Lab Sci* 22(1985):185-218, at pp. 185-186.

[30] Clark, J., ed. *The Nervous System: Circuits of Communication. The Human Body*. Torstar Books, Inc., 1985, at pp. 152-154.

Since *Roe* a number of generally accepted assumptions about human neurological development and ability to feel pain have been refuted. The first assumption was that neonates were incapable of feeling pain.[31] The second, that myelinated nerve fibers were necessary for pain perception (and they did not form completely until after birth). The third, that pain experience required pain detecting nerves connected to the thalamus and then to the brain cortex (and a period of cortical maturation). These assumptions were based upon gross histological observations, with no knowledge of neuropeptides, or the methodologies and techniques developed in the last decade. Only in the last decade has the concept that even normal neonates cannot feel pain been challenged,[32] and the assumption that a fully developed and mature cortical brain region was necessary for pain perception was inconsistent with the observations of care givers for premature infants.[33]

[31] Porter, F. "Pain in a Newborn," *Neonatal Neurology, Clinics in Neonatology*, 16(2) p. 549 et seq. (1989).

[32] Fitzgerald, M.; and McIntosh, N. "Pain and Analgesia in the Newborn." *Arch Dis Child* 64(1989): 441-443, at p. 441.

[33] Fletcher, A.B. "Pain in the Neonate." *N Eng J Med* 317(1987): 1347-1348, at p. 1347. Biochemical studies supported the observations of care givers concerning pain experiences. Detailed hormonal studies in preterm neonates undergoing surgery under minimal anesthesia have shown marked release of catecholamines, as well as autonomic nervous stimulation, heart rate changes,

Based upon new studies standard medical practice changed:

> Any decision to withhold anesthetic agents ought not to be based on the infant's age or *perceived degree of cortical maturity*; it should be based upon the same criteria used in older patients."[34] (Emphasis added).

With operative procedures being performed on premature babies as early as four months, it is a standard medical practice to anesthetize the child (at any age).[35] Anesthesia is used during fetal surgery as early as 18 weeks gestation.[36]

increased hormonal activity and increased motor activity. These are associated with experiences of pain. Rosen, M.A., *Anesthesia for Procedures Involving the Fetus* (1991), Seminars in Perinatology 15:410-417. It has been documented that endocrine and metabolic responses associated with pain are abolished by giving anesthesia to preterm neonates Scanlon, J.W.; "Appreciating Neonatal Pain." *Adv Pediatr* 38(1991): 317-333, at p. 320. Rosen, M.A. "Anesthesia for Procedures Involving the Fetus." *Semin Perinatol* 15(1991): 410-417, at p. 431), and to the fetus Levine, A.H. (1991), Fetal Surgery, *Aorn J*, V54(1): 16-19, 22-27, 30-32, at p. 27. Rosen, M. "Anesthesia and Monitoring for Fetal Intervention" In *The Unborn Patient* 2nd ed., (1991), Harrison (editors), W.B. Saunders Co. p. 176, at p. 176).

[34] Fletcher, A.B. "Pain in the Neonate." *N Eng J Med* 317(1987): 1347-1348, at p. 1348.

[35] See Porter, F., *Pain in a Newborn*, Neonatal Neurology, Clinics in Neonatology, 16(2) p.549 et seq. 1989. For general discussion of current medical practice for pain relief for neonates see: Choonara, I, *Management of Pian in Newborn Infants*, in Seminars on Peranotology, 16(i):32-40 (1992); Malhortora, N., L. Han, *Privilege of Analgesia in the Neonate*, in Seminars in Perinatology, 15(5):418-422 (1991).

[36] Levine, A.H. "Fetal Surgery." *Aorn*, 54(1991): 17-19, 22-27, 30-32, at p. 27-30; Harrison, M.R., et als., "Correction of Congenital Diaphragmatic Hernia In Utero, V. Initial Clinical Experience." J Pediatric Surg 25(1990):47-57, at p. 49; Strickland, R.A., et als., "Anesthesia, Cardiopulmonary Bypass, and the Pregnant Patient." *Mayo Clin Proc* 66(1991): 411-429, at p. 411-415. Harrison, M.R., et als., "Successful Repair in Utero of a Fetal Diaphragmatic Hernia After Removal of Herniated Viscera from the Left Thorax." *N Eng J Med* 322(1990): 1582-

Until recently pain perception was presumed to require myelinated nerve fibers[37]. This is not the case even in adults.[38] Unmyelinated nerve fibers transmit pain.[39] Most fibers of the nervous system are not myelinated until two years after birth.[40] The classical view of the nervous system as a hard wired system projecting from nociceptors (pain detecting nerves) to the thalamus and then to the cortex cannot explain all pain experiences.[41]

1584, at p. 1582. Longuker, M.T., et als., "Maternal Outcome After Open Fetal Surgery." *JAMA* 265(1991): 737-741, at p. 737. Harrison, M.R., et als., "Fetal Hydronephrosis: Selection and Surgical Repair." *J Pediatr Surg* 22(1987): 556-558, at p. 556. Rosen, M. "Anesthesia and Monitoring for Fetal Intervention" In *The Unborn Patient* 2nd ed., edited by M.R. Harrison 172-181. Philadelphia: W.B. Saunders Co., 1991, at p. 176; Strickland, supra, at 411; Rosen, M. "Anesthesia and Monitoring for Fetal Intervention" In *The Unborn Patient* 2nd ed., edited by M.R. Harrison 172-181. Philadelphia: W.B. Saunders Co., 1991, at p. 176;

[37] Clark, J., ed. *The Nervous System: Circuits of Communication. The Human Body*. Torstar Books, Inc., 1985, at p. 153.

[38] Anand, K.J.S.; and Hickey, P.R. "Pain and Its Effects in the Human Neonate and Fetus." *N Engl J Med* 317(1987): 1321-1329, at p. 1322. Casey, K.L. "Neural Mechanisms of Pain: An Overview." *Acta Anaesthesiol Scand* Suppl 74(1982): 13-20, at 13.

[39] Anand, K.J.S.; and Hickey, P.R. Id; Clark, J., ed. *The Nervous System: Circuits of Communication. The Human Body*. Torstar, 1985, p. 109; Scanlon, J.W.; "Appreciating Neonatal Pain." *Adv Pediatr* 38(1991): 317-333, 320.

[40] Clark, J., ed. "The Nervous System: Circuits of Communication." *The Human Body*. Torstar Books, Inc. (1985).

[41] Wall, P.D. "The Biological Function and Dysfunction of Different Pain Mechanisms." In *Advances in Pain Research and Therapy*. Edited by F. Sicuteri, (10:19-28). New York: Raven Press, 1992, at p. 19.

Science now questions the assumption that cortical involvement is necessary for pain detection.[42] Evidence supporting the conclusion that pain can be experienced before 23 weeks gestation includes the early detection of pain associated chemicals; the timing of nerve development; the observation of fetal behavior and the characterization of full term infants with anencephaly.

The presence of substance P is a leading indicator of an organ system's ability to detect and transmit pain.[43] The involvement of neuropeptides in pain transmission was not known when science originally theorized a sensory cortex was needed for pain perception. It is a pain transmitter and a neuromodulator in the primary cortical areas of sensorial integration,[44] and was found in neuronal elements of the human cortex at eighteen weeks gesta-

[42] Boreus, L.O. "Pain in the Newborn - Pharmacodynamic Aspects. *Dev. Pharmocol Ther* 15(1990): 142-148, at p. 144. Lagercrantz, H.; and Forssberg, H. "Functional Development of the Brain in the Fetus and Infant. *Lakartidningen* 88(1991) 1880-1885.

[43] "The importance of the early appearance of enkephalin and substance "P" neurons and fibers of the pain pathways in the major subnuclei connecting with the cardiovascular, gastrointestinal and respiratory functions in the human has to be stressed." Yew, D.T., et. al. ***Development and Localization of Enkephalin and Substance P in the Nucleus of the Tractus Solitarius in the Medulla Oblongata of Human Fetuses***, Neuroscience 34(1990) p.491-498, at p. 491.

[44] Manolidis, L.; Baloyannis, S.; and Mandolidis, S. "Substance P in the Acoustic Area of the Cortex During Neuronal Development and Maturation." *Acta Otolaryngol* (stockh) 107(1989: 375-382, at p. 375.

tion (the earliest time point tested).[45] Substance "P" positive neurons and nerve fibers have been detected at eleven weeks and enkephalin positive neurons and nerve fibers at thirteen weeks gestation.[46] Substance "P" has been found as early as five weeks gestation and all stages of development thereafter.[47]

The morphological substrate (the necessary pieces) for nociception (pain detection) in the spinal cord exists at very early developmental stages.[48] At twelve weeks gestation the thalamus, third ventricle, midbrain, brain stem, and cerebellar hemispheres are developed and their appearance, besides physical size, will go

[45] Manolidis, L., Id.

[46] Yew, D.T., et. al. *Development and Localization of Enkephalin and Substance P in the Nucleus of the Tractus Solitarius in the Medulla Oblongata of Human Fetuses*, Neuroscience 34(1990) p.491-498, at p. 491.

[47] Tam, P.K.; and Lister, J. "Maldevelopment of Spinal Cord - Substance P in Spina Bifida." *Z Kinderchir* 41(1986): 206-208. Wadhwa, S., et als., "Substance P-Immunoreactivity in the Developing Human Retinogeniculate Pathway." *Neurosci Lett* 89(1988): 25-30, at p. 25. Paulin, C., et als., "Ontogeny of Substance P in the Digestive Tract, Spinal Cord and Hypothalamus of the Human Fetus." *Regul Pept* 14(1986): 145-153, at p. 145.; Uddman, R., et als., "Peptide-Containing Nerve Fibers in Human Extracranial Tissue: A Morphological Basis for Neuropeptide Involvement in Extracranial Pain?" *Pain* 27(1986): 391-399; Luo, C.B., et als., "Localization of Substance P and Enkephalin by Immuno histochemistry in the Spinal Cord of the Human Fetus." *Neuroscience* 27(1988): 989-993, at p. 989.

[48] Rizvi, T.; Wadhwa, S.; and Bijiani, V. "Development of Spinal Substrate for Nociception" *Pain 4(1987-suppl.): S195.*

unchanged throughout the rest of fetal development.[49] At seven weeks cutaneous sensory receptors appear, preceded by the development of synapses or junctions between sensory nerve fibers and interneurons of the spinal cord:[50]

> neuronal multiplication occurs mainly from the tenth to twentieth gestational weeks, after which no new nerve cells are formed, though neuronal arborization and the information and reorganization of synapses continues until adulthood...Somatosensory functions are developed at an early stage. The pain threshold is assumed to be lower in the fetus than in the adult. In man general fetal movements appear from the eighth gestational week and more complex movements such as sucking, swallowing and breathing during the tenth to twelfth gestational weeks. These movements are generated by neuronal networks.[51]

Movement by the fetus away from outside stimulation,[52] and brain activity,[53] have been observed by the eighth week. Nature prepares the nervous system first so that all other systems can

[49] Filly, R.A. "Sonographic Anatomy of the Noraml Fetus" In *The Unborn Patient* 2nd ed., ed. Harrison et al., 92-130, Phila.: W.B. Saunders Co., 1991, at 122.

[50] Anand, K.J.S.; and Hickey, P.R. "Pain and Its Effects in the Human Neonate and Fetus." *N Engl J Med* 317(1987): 1321-1329, at p. 1322.

[51] Lagercrantz, H., et als. "Functional Development of the Brain in the Fetus and the Infant." *Lakartidningen* 88(1991): 1880-1885.

[52] Flower, M.J. "Neuromaturation of the Human Fetus." *J Med Philos* 10(1988): 237-351.

[53] Goldenring, J.M. "Development of the Fetal Brain." *N Engl J Med* 307(1982): 564, at p. 564; Flower, M.J., *supra*.

develop and function properly.[54] A basic sensory response loop is clearly present shortly after eight weeks gestation.

It was recently discovered that many behaviors characteristic of newborns are clearly present in children with anencephaly[55] (children born without a developed cortex).[56] Previously, these behaviors had erroneously been ascribed to cerebral hemispheric activity.[57] After birth they live a few hours to a few months.[58] After birth these children breath spontaneously, have a grasp response,[59] and respond to noxious stimuli known to cause pain by avoidance, by withdrawal and by crying.[60] They breath,

[54] Kalvger, G.; and Kalvger, M.F. Human Development: *The Span of Life.* St. Louis: The C.V. Mosby Company, 1974, at p. 35.

[55] The Medical Task Force on Anencephaly, (Stumpf, D.A., et al.) "The Infant with Anencephaly" *N Eng J Med* 322(1990): 669-674.

[56] Shewmon, D.A., et als., "The Use of Anencephalic Infants as Organ Sources: A Critique." *JAMA* 261(1989): 1773-1781.

[57] The Medical Task Force on Anencephaly, supra.

[58] Stumpf, D.A., Chair of Medical Task Force on Anencephaly "The Infant With Anencephaly." *N Eng J Med* 322(1990): 669-674.

[59] Ashwal, S., et als., "Anencephaly: Clinical Determination of Brian Death and Neuropathologic Studies." *Pediatr Neurol* 6(1990): 233-239.

[60] Stumpf, D.A., Chair of Medical Task Force on Anencephaly. "The Infant With Anencephaly." *N Eng J Med* 322(1990): 669-674. Shewman, D.A., et als., "The Use of Anencephalic Infants as Organ Sources: A Critique." *JAMA* 261(1989): 1773-1781. Van Assche, F.A. "Anencephalics as Organ Donors." *Am J Obstet Gynecol* 163(1990): 599-600. Ashwal, S., et als., "Anencephaly: Clinical Determination of Brain Death and Neuropathologic Studies." *Pediatr Neurol* 6(1990):

cough, hiccup, smile, grimace, yawn and suck. In a recent study of twelve anencephalic infants, all twelve responded to pain, had an exaggerated sustained response to touch, evidenced spontaneous movement, and breathed spontaneously.[61] Seven of the twelve responded to a stimulation at their mouth towards the stimulus and a sucking response.[62] Spontaneous movement in the child begins between six and seven and one-half weeks gestation.[63] Stimulation of the mouth area resulting in a response towards the stimulus is seen in the child at 9 weeks gestation and sucking 11 weeks.[64] The child 6 to 11 weeks gestation is neurologically developed at least equivalent to the twelve anencephalic children described above. They are capable of experiencing pain.

II. THE COURT SHOULD GRANT THE WRIT AND DETERMINE ISSUES NEVER DIRECTLY DETERMINED BY THIS COURT: [1] DO ALL HUMAN BEINGS ENJOY A RIGHT TO LIVE PRIOR TO BIRTH; AND [2] DOES A CHILD'S INTEREST IN LIFE, PRIOR

233-239.

[61] Ashwal, supra.

[62] *Id.*

[63] de Vries, J.I.P.; Visser, G.H.A.; and Prechtl, H.F.R. "The Emergence of Fetal Behavior. I. Qualitative Aspects." *Early Hum Dev* 7(1982): 301-322. Flower, M.J. "Neomaturation of the Human Fetus." *J Med & Phil* 10(1985): 237-251.

[64] Flower, M.J. "Neomaturation of the Human Fetus." *J Med & Phil* 10(1985): 237-251.

TO BIRTH, OUTWEIGH THOSE OF THE MOTHER, UNDER ANY PARTICULAR SET OF CIRCUMSTANCES.

A. THE CHILD HAS CONSTITUTIONAL RIGHTS PRIOR TO BIRTH.

1. The Weight of the Legal Authorities Conclude that the Life of a Child Begins at Conception.

The weight of legal authority supports the conclusion that the child is a human being prior to birth. New Jersey recognizes that a child's life begins at conception. See, *Smith v. Brennan*, 157 A.2d 497, 504-505 (1960); *Hummel v. Reiss*, 608 A.2d 1341, 1345-1346 (1992); *Gleitman v. Cosgrove*, 227 A.2d 689 (1967);(A-358 to A-359; A-367 to A-370). The thirty-six other states which have addressed this issue have found that the life of a child begins at conception or shortly thereafter.[65]

[65] See authorities and quotations from each jurisdiction. Appendix C at A-31 to A-57. In addition, in 1978 the Organization of American States made effective its Declaration of Human Rights, which states: "Every person has the right to have his life respected. This right shall be protected by law, and, in general, from the moment of conception. No one should be arbitrarily deprived of his life." Chapter II, Art. 4, §1. Signed by: Argentina, Barbados, Bolivia, Colombia, Costa Rica, Dominican Republic, Ecquador, El Salvador, Grevado, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Peru, Uruguay, and Venezuela. A careful review of 18th Century Authorities reveals that the early British Common Law recognized rights in the child from the earliest moments that science could then verify the child's existence. See Appendix D at A-58 to A-71.

"Viability" is an arbitrary age of the child that has no relevance of a factual, moral or legal nature.[66] In *Smith v. Brennan*, 157 A.2d 497 (1960), the New Jersey Supreme Court stated:

> The most important consideration, however, is that the viability distinction has no relevance to the injustice of denying recovery for harm which can be proved to have resulted from the wrongful act of another. Whether viable or not at the time of inquiry, the child sustains the same harm after birth; therefore, should be given the same opportunity for redress. 157 A.2d at 504.

The irrelevance of the child's dependence was eloquently expressed in *Kelly v. Gregory*, 125 N.Y.S. 2d 696, 697 (1953):

> The mother's biological contribution from conception on is nourishment and protection; but the foetus has become a separate organism and remains so throughout its life. That it may not live if its protection and nourishment are cut off earlier than the viable stage of its development is not to destroy its separability; it is rather to describe conditions under which life will not continue. Succeeding conditions, exist, of course, that have that result at every stage of its life, post-natal as well as prenatal. Id. at 697.

[66] In retrospect, the "viability" distinction is little other than a preferred avoidance of the messy and unpleasant fact that some children will survive abortion after viability, perhaps maimed, despite the best efforts to terminate their lives. It is a rationalization for society to assist in terminating the life of the human being, but only if we need not witness the aftermath. See, *Abele v. Markle*, 351 F.Supp. 224, 232 (D.C. Conn. 1972), which some have suggested was the inspiration for *Roe v. Wade*, not only on "viability" but the suggestion that the law should avoid addressing the obvious humanity of the child [Id. at 231].

Most of the states which addressed the question have found that viability has no factual or legal relevance.[67] It is as unjust to subject a child to a painful death before "viability" as it is after.

2. The Right of a Person to Live Depends Only Upon the Existence of the Individual Human Being.

The child's interest in life from the moment of being is the basis for a right to live because (1) government has no power to deny the natural and inalienable right to life from any class of human beings and (2) the class of persons protected by the Fourteenth Amendment is coextensive with all humanity.

(a)

[67] *Wolfe v. Isbell*, 280 So.2d 758, 761 (1973) (Ala.); *Simon v. Mullin*, 380 A.2d 1353 (1977) (Conn.); *Greater Southeast Community Hosp. v. Williams*, 484 A.2d 394, 396 (D.C. Ct. App. 1984); *Day v. Nationwide Mut. Ins. Co.*, 328 So.2d 560, 561 (1976) (Fla.); *Renslow v. Mennonite Hospital*, 367 N.E. 2d 1250, 1252-53 (1977) (Ill.); *Cheaney v. State*, 285 N.E.2d 265, 268 (1972) (Ind.); *Cowe v. Forum Group, Inc.*, 541 N.E.2d 962, 967-68 (Ind.App. 1989); *Johnson v. Southern New Orleans Light and Traction Co.*, Docket 9048 (La. App. Orl. Dec. 10, 1923); *Valence v. La. Power & Light Co.*, 50 So.2d 847 (La. App. 1951); *Smith v. State*, 33 Me. 48, 57 (1851); *Group Health Ass'n v. Blumenthal*, 453 A.2d 1198, 1206 (1983) (Md.); *Torigan v. Watertown News Co., Inc.*, 225 N.E.2d 926, 927 (1967) (Mass.); *Womack v. Buchhorn*, 187 N.W.2d 218 (1971) (Mich.); *Steggall v. Morris*, 358 S.W.2d 577, 579-81 (1953) (Mo.); *N.D. Cen. Code*, secs. 12.1-17.02 through 12.1-17.1.06 (Supp. 1991); *Hopkins v. McBane*, 359 N.W.2d 862, 865 (N.D.); *Williams v. Marion Rapid Transit*, 87 N.E.2d 334, 340 (1949) (Ohio); *Steinberg v. Brown*, 321 F.Supp. 741, 746 (N.D. Ohio 1970); *Evans v. Olson*, 550 P.2d 924, 925 (1976) (Okla.); *Amadio v. Levin*, 501 A.2d 1085, 1087 (1985) (Pa.); *Sinkler v. Kneale*, 164 A.2d 93, 96 (1960) (Pa.); Sylvia v. Gobeille, 220 A.2d, 222, 223-24 (1966) (R.I.); *Kalafut v. Gruver*, 389 S.E.2d 681, 683-84 (1990) (Va.); and *Puhl v. Milwaukee Auto Ins. Co*, 99 N.W.2d 163, 170 (1959) (Wis.).

The right to life, the most basic of all human rights, is not derived from government but from an individual's existence, and the interest that each person has in life. The essence of the right itself prohibits denial by classification. The Declaration of Independence states that man's 'unalienable' right to life is a 'self-evident truth', and that the very purpose of our government is to protect the natural rights of people. This understanding (that the right to live is derived from nature and government has the power to limit the class of those who enjoy the right) was shared by both the framers of the Fourteenth Amendment and the Founding Fathers.[68]

Representative John A. Bingham, author of section one of the Fourteenth Amendment stated:

> [T]he Constitution of the United States...declared that "no person shall be deprived of life, liberty, or property without due process of law." By the great law of ours it is not inquired whether a man is "free" by the laws of England; it is only to be inquired *is he a man*, and therefore free by the law of that

[68] Representative Thaddeus Stevens, on the date the Thirteenth Amendment was declared ratified, proclaimed:

> This is man's Government; the Government of all men alike; not that all men will have equal power and sway within it. Accidental circumstances, natural and acquired endowment and ability, will vary their fortunes. But equal rights to all the privileges of Government is *innate in every immortal being, no matter what the shape or color of the tabernacle which it inhabits.* Cong. Globe, 39th Cong., 1st Sess. 74(1865) (emphasis added).

For Abraham Lincoln's understanding of the Declaration as the founding document and its significance to life and liberty see his first inaugural address on the relationship of the Constitution and the Declaration. See also partial list of his statements found in Appendix VV at A-71a.

creative energy which breathed into his nostrils the breath of life, and he became a living soul, endowed with the rights of life and liberty ... Before that great law *the only question to be asked of a creature claiming its protection is this: Is he a man?* Every man is entitled to the protection of American law, because its divine spirit of equality declares that all men are created equal. Cong. Globe, 40th Cong., 1st Sess.542 (1867)(emphasis added).

Alexander Hamilton wrote:

The principal aim of society is to protect individuals, in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature; but which could not be preserved without that mutual assistance, and intercourse, which is gained by the institution of friendly and social communities. Hence it follows, that the first and primary end of human laws, is to maintain and regulate these *absolute rights* of individuals."... The Papers of Alexander Hamilton, Vol. I:1768-1778 Ed. Harold C. Syrett, Columbia Univ. Press, N.Y. (1961) "The Farmer Refuted".

The most powerful statements that the natural right to life extends to all, beginning as it does, from the moments of life within a mother's womb, and government powerless to deny, were expressed by James Wilson, of whom historians say that but for him the Constitution would not have been adopted:[69]

Life, and whatever is necessary for the safety of life, are the natural rights of man. ...With consistency, beautiful and unde-

[69] McMaster & Stone's History of Pennsylvania in the Convention, p. 758. James Dewitt Andrews, observed of his speech in November, 1787, that Curtis in his Constitutional History of the U.S. p. 309 claimed "is one of the most comprehensive and luminous commentaries on the constitution... . It drew from Washington a high encomium and gained the vote of Pennsylvania for the new government against the ingenious and captivating objections of its opponents." Bancroft is of the same opinion, Hist. of U.S., Vol. VI p. 387.

viating, human life, from its commencement to its close, is protected by the common law. In the contemplation of law, *life begins when the infant is first able to stir in the womb*. By the law, life is protected not only from immediate destruction, but from every degree of actual violence, ...These rights and duties are indeed, as has been observed, great pillars on which chiefly rest the criminal and the civil codes of the municipal law. It would surely be preposterous to undermine their foundation, with a view to give strength or stability to what they support - to unfix what rests on the immovable basis of nature, and to place it on the tottering institutions of man. I here close my examination into those natural rights which, ..., it is the business of civil-government to protect, and not to subvert, and the exercise of which it is the duty of civil government to enlarge, and not to restrain. The Works of James Wilson, Ed. by James DeWitt Andrews, Callaghan & Co., Chicago (1896) Vol. I & II p. 314-335.

Wilson acknowledged the natural right of a father to protect his child's life and the role of government to secure the rights:

> The defense of one's self, justly called the primary law of nature, ...is not confined merely to his own person; it extends to the persons of all those, to whom he bears a peculiar relation, of his wife, of his parent, of his child ... Id., 335.

> Government, ..., should be formed to secure and to enlarge the exercise of the natural rights of its members; and every government, which has not this in view, as its principal object, is not a government of the legitimate kind. Those rights result from the natural state of man; from that situation, in which he would find himself, if no civil government was instituted. Id. at 307, 308.[70]

(b)

[70] See statements of founders on the natural rights. Appendix WW at A-71f.

The Fourteenth Amendment itself is a source of the child's right to life. It is clear that the framers of the Thirteenth and Fourteenth Amendments equated the word "person" with "human being."[71]

Congressman John A. Bingham of Ohio, the author of Section 1 of the Fourteenth Amendment, used the word "person" interchangeably with "human being":

> The provision of our Constitution is, "no person shall be deprived of life, or liberty, or property without due process of law."...this new Magna Carta to mankind declares the rights of all to life and liberty and property; that no person by virtue of the American Constitution, but the majesty of American law, shall be deprived of life or liberty or property without due process of law. ...I would pass the bill, not only for the sake of giving present relief to the unfortunate human beings for whose special relief it is designed but I would pass this bill for the purpose as well of giving assurance...that no man shall ever, in the coming future,...be deprived of his life, of his liberty, or his property without due process of law. Cong. Globe, 37th Cong. 2d Sess. (April 11, 1862) 1683-1690.

Indeed, examples are numerous which show the basic assumption of the framers that "in the eyes of the Constitution, every *human being* within its sphere ... from the President to the slave, is a *person*." Cong. Globe, 37th Cong., 2d Sess. 1449 (1862)

[71] Senator Lyman Trumball, Illinois, noted on the Senate floor:
I consider that under the constitutional amendment Congress is bound to see that freedom is in fact secured to every person throughout the land; he must be fully protected in all his rights of person and property; and any legislation or any public sentiment which deprives any human being in the land of those great rights of liberty will be in defiance of the Constitution; ... Cong. Globe 39th Cong. 1st Sess. Dec. 19, 1865 Jan. 19, 1866, 322,323.

(Sen. Sumner) (first emphasis added).[72] It is also clear that the framers of the Fourteenth Amendment intended the Due Process Clause to be coextensive with the total class of all humanity, as a constitutional codification of the natural and inalienable rights.[73] John Bingham stated:

> Natural or inherent rights, which belong to all men irrespective of all conventional regulations, are by this Constitution guar-

[72] E.g., Cong. Globe, 39th Cong., 1st Sess. 77(1866) (Sen. Trumbull) ("any legislation or any public sentiment which deprives any human being in the land of those great rights of liberty will be in defiance of the constitution"); id. at 322-23 (Sen. Trumbull) ("great object of securing to every human being within the jurisdiction of the Republic equal rights before the law"); id. at 1159 (Rep. Windom) (rights to life, liberty, and pursuit of happiness are "rights of human nature," and the most basic "right of human nature [is] the right to exist"); id. at 1151 (Rep.Thayer) ("relief of human nature" secured in thirteenth amendment); 3 Cong. Rec. 1794 (1875) (Senator Allen G. Thurman) (may not deny equal protection to "any person" in the jurisdiction, "be he sane or be he insane, be he old or be he young, be he innocent or be he criminal, be he learned or be he ignorant") (emphasis added).

[73] Representative James S. Brown expressed the belief that the right to life required nothing other than human existence itself:

> *[D]oes the term "person" carry with it anything further than a simple allusion to the existence of the individual?* It certainly cannot be strained into any recognition of slavery, since the very recognition of personality excludes [an institution which] does not regard its victims as persons but as chattels. Cong. Globe, 38th Cong., 1st Sess. 1753 (1864) (emphasis added).

Representative Joshua R. Giddings stated:

> Our fathers, recognizing God as the author of human life, proclaimed it a "self-evident" truth that every human being holds from the Creator an inalienable right to live ...If this right be denied, no other can be acknowledged. If there be exceptions to this central, this universal proposition, *that all men, without respect to complexion or condition, hold from the Creator the right to live,* who shall determine what portion of the community shall be slain? And who may perpetuate the murders? Cong. Globe, 35th Cong., 1st Sess.App. 65-66 (1858) (emphasis in original).

anteed by the broad and comprehensive word 'person', as contradistinguished from the limited term citizen as in the 5th Article of Amendments...that 'no person shall be deprived of life, liberty, or property'...Cong. Globe, 37th Cong. 2d Sess. 1638 (1862)

Senator Arthur S. Boreman explained in regard to the then recently enacted Fourteenth Amendment:

> This ... includes every person that is found within these States, and guaranties to all life, liberty and property, and equal protection of the laws. ...It is not restricted to guarantying the right of a "citizen" ...but it extends to every "person", whether he has come from another State or not, to *every person residing anywhere, everywhere,* within the United States. So that while, before this amendment, if there was any question whether there were *any class of persons* in this country over whom the protection of the Constitution of the United States was not extended there cannot now be any longer any question on that subject. Cong. Globe, 42nd Cong., 1st Sess.App. 229 (1871) (emphasis added).[74]

[74] After careful examination of the antislavery background of the Civil War amendments and their legislative histories, one of the leading legal historians, Professor Jacobus tenBroek, wrote in his study of the Fourteenth Amendment:

> The Thirteenth Amendment nationalized the right of freedom. It thereby nationalized the equal right of all to enjoy protection in those natural rights which constitute that freedom. ...The Fourteenth Amendment reenacted the Thirteenth Amendment and made the program of legislation designed to implement it constitutionally secure or a part of the Constitution. ...The clause of equal protection of the laws ...(a)s the basic conception as the heart of the ... human and civil rights bills and debates upon them, as the common denominator of the drafts of the Fourteenth Amendment, as the pith and substance of section 1 in its final form, this was the meaning understood and accepted by friend and foe alike. Protection of men in their fundamental or natural rights was the basic idea of the clauses; equality was a modifying condition. ***The clause was a confirmatory reference to the affirmative duty of government to protect men in their natural rights.*** Jacobus tenBroek, the Anti-Slavery Origins of the Fourteenth Amendment (1951) 219-221.

The "justice principle" is employed in the interpretation of the Constitution. As an instrument of basic justice, due process cannot "offend 'a sense of justice'." *Rochin v. California*, 342 U.S. 165, 169-173 (1958). Can it possibly be that it does not "offend a sense of justice" that a child, even before birth, could be subjected to a painful dismemberment and death without justification? To extract the child's brain tissue? To extort money in a surrogacy arrangement? Because one who intended to conceive changed one's mind? If it does not offend our sense of justice, we are not the nation we intended to be.

3. If the State Has an Interest to Justify Protection of the Life of a Child Before Birth, the Child Possesses its Own Right to Life. The True Interest of the State Rests in its Parens Patriae Powers Which are Derivative of the Rights of the Child.

The recognized interest of the state "in life" (*Roe*, at 164, 165; *Casey*, 112 S.Ct. at 2804) implies the child's own interest in life. (See IIA2 above). Logically the power rests in the State's *parens patriae* jurisdiction, since it is now clear that the "life" is a helpless human being who experiences pain. *Parens patriae* includes the protection of the rights of individuals who cannot, by reason of

disability, assert their own rights.[75] When exercising such powers, the state can only vindicate the interest held by the individual it seeks to protect. *Snapp v. Puerto Rico*, 458 U.S. 592, at 600 (n.8 (1982). *Roe*'s recognition of the state interest in the life of the child before birth requires explicit acknowledgement of the child's own interest in life, otherwise the law would be exactly opposite to the principles upon which this nation was built, and the very purpose of the Fourteenth Amendment itself. See II.A.2.

4. Denying Children the Right to Live on Their Status as "Unborn" is a Denial of the Equal Protection of the Law.

Classifications that are subject to equal protection scrutiny under the Fourteenth Amendment may rise under the case law or common law of the state as well as under its legislative enactments. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); *Shelley v. Kraemer*, 334 U.S. 117 (1948). Where the right to life itself is involved, derived from one's existence and being

[75] *Reno v. Flores*, ___ U.S. ___, 110 S.Ct. 2841, 2853, 2871 (1993) (where the custody of a minor by the parent or legal guardian fails, the government must exercise custody itself or appoint someone else to do it); *Cruzan v. Missouri Dept. of health*, __ U.S. __, 110 S.Ct. 2841 (1991) (state could refuse to permit withdrawal of life sustaining measures from comatose patient under *parens patriae* powers); *Schall v. Martin*, 467 U.S. 253 (1984) (if parental control falters, the State must exercise *parens patriae* powers); *Santosky v. Kraemer*, 455 U.S. 745, 766 (1982) (state can terminate constitutionally protected parental rights to protect a child.)

"natural and inalienable," the classification created by New Jersey requires a showing of a compelling state interest. *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969); *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533, 561-562 (1964); *Kraemer v. Union Free School District*, 395 U.S. 621, 626-628 (1969); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Cf. Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

B. A MOTHER'S RIGHT MUST ONLY REFLECT HER TRUE INTERESTS AND MUST ACCOUNT FOR THE FACT THAT HER CHILD IS A HUMAN BEING WHO EXPERIENCES PAIN.

In *Casey*, both the Joint Opinion and the Dissent stated it was necessary *Roe* be reexamined.[76] However, by not reexamining the question whether the child possesses constitutional rights prior to birth, *Casey* failed to reexamine *Roe* in its most essential element.[77] It is beyond reasonable dispute that a child twenty six weeks after conception is in fact a human being whether prematurely born or remaining within a mother's womb. By this acknowledgement the conflict shall naturally resolve.[78]

[76] Casey, 112 S.Ct. at 2804 (Rehnquist, C.J., dissenting) 112 S.Ct. at 2855.

[77] See, similar observation of Justice Scalia, dissenting, 112 S.Ct. at 2875.

[78] Justice Stevens alone addresses the question in Casey. But his statement that the Joint opinion implies that the child is not a "constitutional person" is no more true than the observation that the Joint Opinion implies that a child, after viability, is unequivocally a person in fact. The latter contradicts the former. *Casey* addressed neither. See, *Casey*, 112 S.Ct. at 2807.

The primary objection to *Roe* is that it is unjust and its consequences too great for a person of conscience to ignore. That the injustice is built upon unsound application of constitutional principles can best be appreciated when the problem is expressed in its simplest terms: the relative interests of a mother and the competing "interests of the State" have not been satisfactorily identified and their relative weight when balanced have never accurately reflected the real interests of either.[79]

The problem has been created by ignoring the fact of the child's existence stemming from either the Court's good faith belief in 1973 that it could not reach reliable judgments about the facts, or a fear that recognition of the facts are construed as an imposition

[79] This is substantially acknowledged in *Casey*, 112 S.Ct. at 2818. The mother's right was defined in *Roe* as "fundamental" throughout pregnancy. The state's interest in protecting the life of the child was not recognized before "viability" and thereafter the state's interest (described as one to protect "potential life") became "compelling." *Roe*, 410 U.S. at 163, 164.

In *Casey*, a mother's rights are neither referred to as "fundamental" nor the state's interest as "compelling" but the result is basically the same: a mother may terminate the life of her child before "viability" but the state can prohibit it thereafter. In both analyses it is never precisely defined what is occurring: does the interest of the mother diminish [or is it now waived? See, *Casey*, 112 S.Ct. at 2817] or does the state's interest become greater (as stated in *Roe*?) The waxing and waning of either set of interests has often been the subject of criticism. See, *Thornburgh v. A.C.O.G.*, 476 U.S. 747, 814, 828 (O'Connor, J., dissenting) "I do, however, remain of the views expressed in my dissent in *Akron*, 462 U.S. at 459-466. The state has compelling interests in ensuring the general health and protecting potential human life, and these interests exist 'throughout pregnancy')" Id. at 461. *Thornburgh v. A.C.O.G.*, 476 U.S. at 785 (White, J., dissenting) "the state's interest, if compelling after viability, is equally compelling before viability.") *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) ("We do not see why the state's interest in protecting potential human life should come into existence only at the point of viability and ... therefore be a rigid law allowing state regulation after viability but prohibiting before viability.") The interests of the state and those of a woman (both the same throughout pregnancy) are at odds with the balancing result that allows prohibition of abortion at one point in time but not at another.

of a "subjective" view. Yet, the court, by failing to address the fact of the child's life, has rendered a *de facto* judgment, imposing its view upon all of society that the lives of this class of children have no value; precisely the judgment about the lives of people that governments, especially courts, have no power to make. [See, IIA.2].

1. Nature and Scope of the Mother's Real Interests.

Roe identified a woman's interests involved. The Court listed five potential harms to a woman used to conclude that her *Griswold* rights include abortion. *Roe*, at 153. The first, judgments about a mother's health where her life is in danger involves not only private judgments, but her right to life itself. However, the other concerns listed by *Roe* do not justify terminating the life of a child: (1) maternity or additional offspring may cause a distressful life; (2) mental and physical health may be taxed by child care; (3) distress associated with an unwanted child; and (4) additional difficulties and continuing stigma of unwed motherhood. That these are legitimate concerns that implicate the right of privacy, there is no doubt. But these are reasons to avoid pregnancy in the first instance or to exercise a free choice after birth. New Jersey does not have a compelling interest to interfere with the private choice of a couple to prevent pregnancy. *Griswold*,

supra. These interests do not justify taking the life of a human being where the couple fail to exercise their *Griswold* rights or they intended to conceive. If these were truly reasons to abort a child then a father would have a coexisting right to demand an abortion. All of these [except "maternity"] are experienced by him even when the child is born out of wedlock. These burdens no longer fall on her alone.[80] If these interests do not support his right to an abortion, then they do not support that of a mother. *Casey* elaborates on the concern pertaining to maternity:

> "The mother who carries a child to term is subject to anxieties, the physical constraints, to pain that only she must bear." *Casey*, 112 S.Ct. at 2807.

But *Casey* does not suggest that this justifies taking the life of another human being. *Casey* recognizes that the interest in protecting the life of the unborn at "viability" is greater than that of the mother. Yet "viability" is precisely when these anxieties, physical constraints and pains are realized in their most acute form. *Casey*

[80] The fact that a mother is the parent who carries the child does not alone give her the singular power over life and death. Both parents are equal contributors to life, with equal obligations following birth. The significant contribution of a mother who bears the burden of maternity is fairly and justly reflected in the New Jersey law which vests in her the right to choose to be the primary custodian of the child if the parents are separated at birth and disagree on custody. *Baby M*, 537 A.2d 1227, 1261 (1988). The fact that she carries and bonds with the child directly bears upon the health and welfare of the mother and child following birth, not the power over actual life itself.

recognized that the responsibility for the avoidance of these inconveniences rests upon the mother before they are realized.[81] The same reasoning applies before conception.

To help focus on the true nature of a mother's interests the following three hypothetical situations, the first two based upon the facts of *Baby M*, 537 A.2d 1227 (1988), are of assistance:

1. Bill Stern married his wife, Betsy, with the intent of having a family. After the death of his parents, Bill had no one genetically related to him because most of his family was killed in the holocaust in Germany. They postponed starting a family so Betsy could finish graduate school, medical school, and then her residency. After a decade they decided to have a child. After Betsy conceived, they made plans for the baby's birth. Subsequently, Betsy changed her mind, and at five months, she told Bill she decided to have an abortion.

2. Bill and Betsy entered into a surrogacy contract with Marybeth Whitehead. Marybeth became pregnant through artificial insemination using the sperm of Mr. Stern. The child was genetically related to Mrs. Whitehead. As the pregnancy progressed she changed her mind about terminating her paternal rights. She told Mr. Stern, while five months pregnant, she could not surrender the baby. Over the next two months Mrs. Whitehead negotiated a custody arrangement. Mr. Stern refused. Mrs. Whitehead then decided to have an abortion.

A third is based on *Anna J. v. Mark C.*, 286 Cal. Rptr. 369 (1991):

[81] *Casey* observes that cutting off the mother's right to abortion has a "sense of fairness"... "In some broad sense it might be said that a woman who fails to act before viability has consented to the state intervention on behalf of the developing child." 112 S.Ct. at 2817.

> 3. Anna J. was a single mother who entered into a written surrogacy contract with Mark C. and his wife to carry a child conceived outside Anna's womb using an egg donated by Mrs. C. and the sperm of Mr. C. Anna was not genetically related to the child. Anna felt that she was not being treated fairly by Mr. and Mrs. C. and demanded greater compensation. Mark C. observed that "a deal is a deal" and refused. When the baby was six months old Anna J. advised Mr. and Mrs. C. that she would have an abortion if they did not satisfy her demands. Mark C. offered more money to save the child's life. The child approached "viability" and Mark C. made a final offer. Shortly after "viability", Anna J. telephoned Mr. and Mrs. C. to make even greater demands. Mr. C. advised her he would make no further offer. Anna then advised that she planned to go to New Jersey where she can obtain an abortion at any time, and that "abortion is her constitutional right".[82]

What are the interests the Court seeks to protect here? There is a child held hostage and then killed. The interests found in *Roe* no more justify these acts then they would if a parent took the life of an infant two days after birth to avoid the stress of child rearing. *See, Thornburgh v. A.C.O.G.*, 476 U.S. at 787-795 (White, J., dissenting). The true interest of a woman is that her pregnancy be the result of a voluntary act.[83]

2. Identifying the Real Nature of the Life in Question.

[82] See *Anna J. v. Mark C., supra*, at FN 11. The irony of the *Anna J.* case is that California found that *Anna J.* did not have parental rights following birth, although under *Roe* she has a right to take the child's life.

[83] Because *Roe* declared abortion a "right" the *Roe* Court undoubtedly influenced some to act in a way they otherwise would not. As the world of the *Anna J.* hypothetical continues to evolve it must be recognized that *Roe* made it possible, and only this Court can stop the harm.

Ever since *Roe* declined to find when life began, the Court has labored under the disability of having never defined the nature of the life which was the subject of its opinions and the basis for an "interest" of the states. This failure and the resultant and substantial uncertainty surrounding the nature of the life is reflected in the language of the Court and imprecise definition of the "state's interest." The Court most often refers to the child as "potential life" and the state's interests as one in 'potential life'. *See, e.g., Roe*, 410 U.S. at 163 (1973); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).[84] Nowhere is this failure and uncertainty more apparent than in *Casey*:

> Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family and society which must confront the knowledge that these procedures exist, procedures

[84] In *Casey* the Joint Opinion refers to the child as: "the life or potential life" (112 S.Ct. at 2807); "postconception potential life" (at 2811); "fetal life" (at 2811); "the life of the unborn" (at 2816); "life" (at 2816); "life or potential life of the unborn" (at 2817); "potential life" (at 2817); and "the life of the fetus that may become a child" (at 2804). The Chief Justice refers to the child as "a fetus" (at 2859); "unborn human life" (at 2867); "unborn life" (at 2868) and "unborn child" (at 2871); Justice Stevens retains the use of "potential life" (at 2840, 2841); Justice Blackmun refers to "potential life" (at 2847) and "prenatal life" (at 2847). Justice Scalia observes on this:

> The whole argument of abortion opponents is that what the Court calls the fetus and what others call the unborn child *is a human life*. Thus, whatever answer *Roe* came up with after conducting its "balancing" is bound to be wrong, unless it is correct that the human fetus is in some critical sense merely potentially human. Scalia, J. dissenting, 112 S.Ct. at 2875.

> some deem nothing short of an act of violence against innocent human life; *and depending on one's beliefs, for the life or potential life that is aborted. Casey*, 505 U.S. ___, 112 S.Ct. at 2807 (emphasis added).

This statement reflects the failure of the Court to reach a conclusion concerning the nature of the life. Either this is a human being or it is not. It is not a "belief", religious or otherwise. It is a matter of fact. This determination affects the nature of a mother's right. If she is killing her own child or not is material, if not decisive. There is no longer any valid reason to avoid this issue.

C. J.M. HAS THE STANDING TO PROSECUTE THE RIGHTS OF HIS CHILD, AND TO DEFEND THE LIFE OF HIS CHILD.

1. The Unique Relationship Between J.M. and His Child Gives Him Standing to Prosecute the Child's Case.

J.M.'s relationship with his child is unique because both have the interwoven common interest in the child's life. The child's interest to have his or her rights prosecuted coincide with the father's interest to defend his child's life. In *Griswold v. Connecticut*, 381 U.S. 479, this Court held that the executive director of a Planned Parenthood League of Connecticut and a licensed physician, had standing to raise the constitutional rights of married couples. *Griswold*, 381 U.S. at 481. Both had been convicted of violating Connecticut's birth control law and the

relationship of the defendants to the couple whose rights were being asserted established their standing to raise the rights of the couples.[85]

A father has traditionally enjoyed standing to protect the interests of his children. A parent, in New Jersey, is the natural guardian of the interests of his child. See R. 4:26-2 (the natural parent is the only guardian to represent the interest of a child in a law suit who need not be appointed by court order). The relationship of a father to a child born out of wedlock gives rise to rights and obligations of a father independent of the nature of his relationship with the child's mother. See, *N.J.S.A.* 9:17-40, et. seq. (imposing obligations on a natural father to support a child born out of wedlock and granting him parental rights). Under New Jersey law the guardianship for nurture vests in a father, and this "natural guardianship" is for bringing up and taking care of the child. See, *N.J.S.A.* 3B:12-12; *Caruso v. Caruso*, 139 A.812

[85] To support this conclusion the court cited *Truax v. Raich*, 239 U.S. 33 (where an employee was permitted to assert the rights of his employer); *Pierce v. Society of Sisters*, 268 U.S. 510 (where the owners of private schools could assert the rights of potential pupils and their parents); and *Barrows v. Jackson*, 346 U.S. 249 (where a white defendant, party to a racially restrictive covenant, was being sued for damages by the covenantor because she had conveyed her property to negroes, could raise the rights of prospective negro purchasers, although no negro was a party to the suit). *Griswold*, 381 U.S. at 481.

(1927). The statutory scheme for intestate succession creates rights in both the father and child who inherit from one another based only upon a genetic relationship. *N.J.S.A.* 3B:5-2.

The relationship of father and child, at every moment from conception to death, implicates the fundamental rights of both, rendering the father a person with a profound interest in the child's welfare. Whether or not they are directly and substantively implicated, the father's Constitutional rights to [1] companionship and association (e.g., *Stanley v. Illinois*, 405 U.S. 645 (1972); *Santosky v. Kraemer*, 455 U.S. 745 (1982); [2] equal protection, (e.g., *Craig v. Boren*, 429 U.S. 190 (1976); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Califano v. Webster*, 430 U.S. 313 (1977); (see A-415 to A-420); [3] procreate (e.g., *Skinner v. Oklahoma*, 316 U.S. 535 (1942); see A-420); [4] discharge his obligation to his children (e.g., *Pierce v. Society of Sisters*, 268 U.S. 510, 518 (1925); see A-421); and [5] defend life (e.g., Art. 1, §1, N.J. Const. 1947; Due Process Clause, Fourteenth Amendment U.S. Const.; see A-367 to A-369), surely form the foundation to distinguish his relationship with the child as unique and sufficient to create in him standing to speak for his child. *Griswold*, supra.

In the abortion context no one else who also has standing has acted to protect the interests of the child. The mother, who has a protected relationship with her unborn child, *Lehr v. Robertson*, 463 U.S. 248, not only refuses to exercise her rights, but is the party seeking to terminate the child's life. On the other hand, New Jersey, which has the power to exercise its *parens patriae* jurisdiction to protect the child, has acted to assist her. It would be a separate constitutional deprivation of the child's constitutional rights, once recognized, to fail to extend standing to a father under such circumstances.[86] It is difficult to imagine a more egregeous violation of the child's right than if a child's life is terminated for failure to recognize a father's standing. They have interwoven interests and rights to life and to defend life under the Due Process Clause of the Fourteenth Amendment. [See IIA2].

2. *Casey* Does Not Preclude Recognition of J.M.'s Standing to Prosecute the Rights of His Child Before Birth.

Casey does not prohibit recognition of J.M.'s standing, because *Casey* never addressed the humanity of the child. If it were so in-

[86] C.f. *Santosky v. Kramer*, 455 U.S. at 760 (where this Court expressly recognized that the fundamental rights which protect the parent - child relationship are shared by both: "...the child and his parents share a vital interest in preventing erroneous termination of their natural relationship").

terpreted, *Casey* would clearly be in conflict with prior precedent once the child is recognized as a human being. *Casey* would confuse two separate rights of the mother and ignore the real right of the father. A father's rights are for the companionship, care, custody and management of his children. *Stanley*, 405 U.S. at 650. *Casey* only examines the question of whether a father may require his "consent" for abortion. *Casey*, 112 S.Ct. at 2830-31. A father *never* has an interest in an abortion, so his permission could never be required. His *only* interest is in preserving the child's life and their relationship. But any analysis of *Roe* and *Casey* forming grounds to terminate a father's rights, or refusing to recognize them at all, which is not consistent with the welfare of the child is at odds with precedent defining parental rights.[87] *Casey* does

[87] Two areas of inquiry determine whether a particular termination is constitutional: (a) whether the particular parent possesses a constitutional right; and (b) whether the grounds for termination satisfy Due Process criteria. In both inquiries, the welfare of the child is the most critical determinant. The grounds for termination have always been related to what is best for the child: only if continuing the relationship would be harmful to the child, could a termination take place. *E.g.*, *Santosky v. Kramer*, 455 U.S. 745 (1982); *see Stanley v. Illinois*, 405 U.S. 645 (1972); *Lehr v. Robertson*, 463 U.S. 248 (1983). As grounds for termination of the rights of J.M., *Roe* conflicts with the termination analysis. Only J.M. sought to protect the best interests of the child, while the mother and the state sought to harm the child. A second inquiry is whether a parent has a constitutionally protected relationship with the child. Here too, the welfare of the child is a critical factor. A father of a child born out of wedlock enjoys a constitutionally protected relationship with his child. *Stanley v. Illinois*, supra. A natural father is not always recognized as having a constitutionally protected relationship. *See Quilloin v. Walcott*, supra; *Lehr v. Robertson*, supra; *Michael H. v. Gerald D.*,

not address the child at all, otherwise, *Roe*, would have created a right to kill a child and *Casey*, building upon *Roe*, would recognize this right as greater than a parent's right to protect the child. There are implicated two separate rights of the mother: her own right to companionship with her child, and her *Griswold* privacy rights. Her right to companionship exists even during pregnancy. C.f. *Lehr, supra*. But this right, like that of the father's, is only to preserve the life of the child and their relationship. This is the right that *Casey* compares with the father's and finds "equal" after birth. 1128 S.Ct. at 2830. Once the child exists, it is impossible that her companionship interest, because of its nature, is that which entitles her to terminate the child's life and the father's rights.

491 U.S. 110 (1989). *Quilloin, supra,* explains under what circumstances the Court would recognize an unwed father's right:

> We have little doubt that the Due Process Clause would be offended 'if the state were to attempt to force the breakup of the natural family, over the objection of parents, and their children without some showing of unfitness and for the sole reason to do so was thought to be in the child's best interest'. *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-863, (1977). But this is not the case in which the unwed father at any time had, or sought, actual or legal custody of his child. Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived. Rather, the result of the adoption in this case is to give full recognition of the family already in existence, a result desired by all concerned, except the appellant. 434 U.S. at 255.

This statement explains the difference in treatment of fathers' rights in *Lehr v. Robertson, supra*, In *Quilloin*, *Lehr* and *Michael H.*, however, the dominant reason for the Court's refusal to recognize the father's rights was because there was an existing family which sought to protect the child's welfare. Therefore, the recognition of a father's rights relates to and depends upon whether a family exists or the mother competes to protect the child's welfare.

The fact that the mother is the parent who carries the child has always been considered relevant to her rights following birth when she is competing for custody with the natural father. This is our understanding of *Lehr*. This fact relates to human bonding and impacts upon the health of both the mother and child. New Jersey law gives the mother the right to choose to be the primary custodian when the natural parents do not live together and disagree on custody at the time of birth. *Matter Of Baby M*, 537 A.2d 1227, 1261 (1988). Therefore, the "inescapable biological fact" that a mother carries the child physically relates to her rights when she seeks to protect the child. To suggest that that fact supports a right to kill the child is contrary to constitutional principles dealing with termination rights. The fact that a mother wants to kill her own child would be a basis for terminating her constitutional rights. The privacy right to preserve the child cannot co-exist with the right to kill the child. They are repugnant.

D. THE PRINCIPLES OF BALANCING COMPETING CONSTITUTIONAL RIGHTS OF PRIVATE CITIZENS REQUIRES NEW JERSEY TO PROTECT THE LIFE OF THE CHILD PRIOR TO BIRTH AT ALL STAGES EXCEPT IN INSTANCES WHEN THE MOTHER'S LIFE IS AT STAKE OR IN SOME CASES OF RAPE OR ITS EQUIVALENT.

This Court has created the criteria for the balancing of competing rights of individuals. First, where possible, the state must

act in a way that no competing interest is frustrated. The court must examine the relative interest of the parties because it is the interest that must be preserved. Second, if the competing rights cannot be reconciled because the conflict necessarily requires that one set of interests shall be frustrated, the Court must preserve the rights of the individual who shall incur the greatest harm. Compare, *Zacchini v. Scripps - Howard Broadcasting, Co.*, 433 U.S. 562 (1977);[88] *Rowan v. U.S. Post Office Department*, 397 U.S. 728 (1970); *Runyon v. McCary*, 427 U.S. 160 (1976).[89]

The true underlying interests which are sought to be protected are the controlling factor in a balancing analysis. *Zacchini, supra*; *Rowan, supra*; *Runyon, supra*. *Roe* identifies the five interests sought to be protected.[90] The child's right to live is "natural and unalienable," based upon the fact of the child's existence and the

[88] In *Zacchini* the court examined the interest of news agencies, and that of an entertainer both of whom sought to protect their own first amendment rights. The Court preserved the interests of both by requiring that the law compensate an entertainer when his act is covered by television news without his permission. The balancing result accommodated both a news agency's interest in making a story public and the entertainer's interest in the commercial stake in his act. The entertainer could not enjoin the story, thus frustrating the agency's interest, but neither could the agency run the story free of charge, thereby frustrating the interests of the entertainer.

[89] In *Runyon* it was held that the right of negroes to be free from racial discrimination must be preserved at the expense of another's right of association where a private school prohibited students based solely on race, because freedom of association permitting parents to send their children to the school of their choice, could not provide affirmative protection to racial discrimination.

[90] [1] Maternity may cause a distressful life and future; [2] Mental and physical health may be taxed by child care; [3] Distress associated with unwanted children; [4] The stigma of unwed motherhood; [5] Imminent and life threatening physical illness for the mother if the child's life is not terminated. *Roe*, 410 U.S. at 153.

child's personal interest in life (see, IIA2 above). Its loss is the most devastating, irreversible, and uncompensible loss of all. This is the interest that must be balanced against those of the mother identified by *Roe*.

In protecting the mother's interests the state must not frustrate the child's interest in life and the father's interests in defending the child's life. Where conception is the result of voluntary conduct a woman's interest is protected from unwanted pregnancy, distress in child rearing, maternity and stigma by permitting the use of contraception. That it is convenient, easier or less expensive to terminate the life of the child during any stage of pregnancy "cannot stand against the preciousness of a single human life." *Gleitman v. Cosgrove*, 227 A.2d 689, 693 (1967).

Although New Jersey policy is to support the mother to enable her to stay with her child following birth if she desires it, the policy is to protect the relationship of mother and child following birth. See generally, *In the Matter of Baby M*, supra. This relationship is more intimate, more precious and more deserving of protection than any other in the human experience. But after birth, the stress and "stigma" (if there still is a stigma) is not imposed upon her. She can avoid both by allowing the father (or someone else) to raise the child. The mother's true interests are protected because she has effective methods to satisfy those interests prior to and after birth. Only by allowing the baby to live, can the interests of the child and father be preserved.

When a mother's interest is avoiding the consequence of medical conditions which pose a significant threat to her own life, there

is a true conflict. In this instance the mother's interest must prevail because: (1) if she carried the child not only would her life, perhaps, be lost, but also that of the child; (2) Although the value of the two lives are equal, there is an inherent deprivation of life, and a mother's role in giving life if a mother's life is subordinate to the child she bears; (3) The law which values the life of the child over the mother under such circumstance would have a chilling effect on women who might otherwise conceive; and (4) this is truly a zone of decision making and sacrifice that no government could require: government does not grant the right to life of a mother any more than it does the child and has no authority to demand the sacrifice.[91]

III A RECOGNITION OF THE CHILD'S RIGHT TO LIFE IS CONSISTENT WITH PRINCIPLES OF *STARE DECISIS*.

Casey did not address the factual or legal component of the question of whether the child possesses rights prior to birth. Yet, *Casey* still found it necessary to rely heavily upon principles of *stare decisis* to preserve a watered-down affirmance of *Roe*, 112 S.Ct. at 2808-2812. The majority discussed four areas of concern: (1) there is no change of fact; (2) *Roe* is not inconsistent with other principles of constitutional law; (3) reliance; and (4) work-

[91] Where conception is not the result of voluntary conduct, in instances of rape and its equivalent, her interests in avoiding pregnancy have not been satisfied. These circumstances may create a substantial risk to a mother's life if the pregnancy ran full term, and the balancing of the relative rights may have the same result as where the mother's life is at stake.

ability. at 2808-2812. Petitioner has addressed the first two of these at IA and IIC.

For "reliance" to be a true bar to overruling a case, the particular conduct engaged in by those who rely upon a specific holding must pose no harm to others. *Payne v. Tennessee*, 111 S.Ct. 2597, 2610-2611 (1991). But if the conduct in question is harmful, then the fact that the decision encourages the conduct is actually a reason to overrule the decision, not perpetuate the harm. Once it is recognized that the life of a child is being taken, the fact that one relied upon an erroneous Court decision is no basis to perpetuate the cruel conduct. The reliance argument also ignores the fact that conception may be intentional.[92]

Casey is reminiscent of the reliance argument advanced by John W. Davis on behalf of *South Carolina in Brown v. Bd. Ed.*, 347 U.S. 483 (1954). In arguing that racial segregation must be per-

[92] Another question is thus posed: does one have a right to abortion because one has a right to enter into irresponsible and immature conduct? Or does one have a right to enter into irresponsible conduct because one has this right to an abortion? If it is the latter, one must be permitted the irresponsible conduct, even if it is unnecessary to preserve the true privacy interest. This is because the privacy interest has been viewed as an all encompassing "right to an abortion" without any relation to the real underlying interest. If the former, then the right is one of enjoying irresponsible conduct without concurrent obligations.

petuated because many states have "relied" upon *Plessey v. Ferguson*, 163, U.S. 537 (1896), Mr. Davis argued:

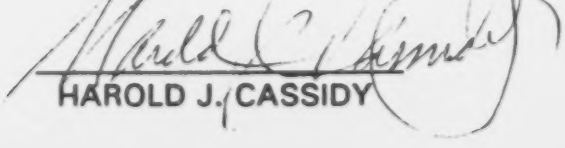
> We *relied* on the fact that this court, not once but seven times ... pronounced in favor of the "separate but equal" doctrine. We *relied* on the fact that the Courts of last appeal in some sixteen or eighteen states have passed upon the validity of the "separate but equal" doctrine vis-a-vis the Fourteenth Amendment. We *relied* on the fact that Congress has continuously since 1862 segregated its school in the District of Columbia. *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law*. Vol. 49A, at 490.

Indeed all of the parties seeking to perpetuate racial segregation in the consolidated cases referred to as *Brown v. Bd. of Ed.* argued not only reliance, but that the conduct was so accepted that desegregation would be too difficult to correct and on that ground alone segregation should be reaffirmed.

When it is recognized that the unborn child is a person in fact, the unworkable nature of *Roe* is apparent. No rule of law that permits one person to take the life of another with impunity will go ignored by people of conscience and the rule of law will engender no respect. Law unworthy of respect is inherently unworkable.

CONCLUSION

The Court should grant the writ and decide these issues.[93]



HAROLD J. CASSIDY

APPENDIX A

LIST OF ONE HUNDRED AND SEVENTY-FOUR CASES WHICH THE U.S. SUPREME COURT OVERRULED PRIOR DECISIONS

1. *Hudson v. Guestier*, 6 Cr. (10 U.S. 281, 285 (1810) (overruling *Rose v. Himley*, 4 Cr. (8 U.S.) 241 (1808)).

2. *Gordon v. Ogden*, 3 Pet. (28 U.S.) 33, 34 (1830) (overruling *Wilson v. Daniel*, 3 Dall. (3 U.S.) 401 (1798)).

3. *Greene v. Lessee of Neal*, 6 Pet. (31 U.S.) 291 (1832) (overruling *Patton v. Easton*, 1 Wheat. (14 U.S.) 476 (1816); *Powell's Lessee v. Harmon*, 2 Pet. (27 U.S.) 241 (1829)).

4. *Louisville Railroad Co. v. Letson*, 2 How. (43 U.S.) 497, 554-556 (1844) (overruling *Commercial and Railroad Bank v. Slocomb*, 14 Pet. (39 U.S.) 60 (1840) and *Strawbridge v. Curtiss*, 3 Cr. (7 U.S.) 267 (1806); *Qualifying Bank of the United States v. Deveaux*, 5 Cr. (9 U.S.) 61 (1809)).

5. *The Genessee Chief*, 12 How. (53 U.S.) 443, 456 (1851) (overruling *The Thomas Jefferson*, 10 Wheat. (23 U.S.) 428 (1825); *The Orleans v. Phoebus*, 11 Pet. (36 U.S.) 175 (1837)).

6. *Gazzam v. Phillip's Lessee*, 20 How. (61 U.S.) 372, 377-378 (1858) (overruling *Brown's Lessee v. Clements*, 3 How. (44 U.S.) 650 (1845)).

7. *Suydam v. Williamson*, 24 How. (65 U.S.) 427 (1861) (overruling *Williamson v. Berry*, 8 How. (49 U.S.) 495 (1850); *Williamson v. Irish Presbyterian Congregation*, 8 How. (49 U.S.) 565 (1850); *Williamson v. Ball*, 8 How. (49 U.S.) 566 (1850)).

8. *Mason v. Eldred*, 6 Wall. (73 U.S.) 231, 238 (1868) (overruling *Sheehy v. Mandeville*, 6 Cr. (10 U.S.) 253 (1810)).

9. *The Belfast*, 7 Wall. (74 U.S.) 624, 641 (1869) (overruling *Allen v. Newberry*, 21 How. (62 U.S.) 244 (1858) (in part)).

10. *Knox v. Lee* (The Legal Tender Cases), 12 Wall. (79 U.S.) 457, 553 (1871) (overruling *Hepburn v. Griswold*, 8 Wall. (75 U.S.) 603 (1870)).

11. *Trebilcock v. Wilson*, 12 Wall. (79 U.S.) 687 (1871) (overruling *Roosevelt v. Meyer*, 1 Wall (68 U.S.) 512 (1863)).

12. *Hornbuckle v. Toombs*, 18 Wall. (85 U.S.) 648, 652-653 (1874) (overruling *Noonan v. Lee*, 2 Bl. (67 U.S.) 499 (1863); *Orchard v. Hughes*, 1 Wall. (68 U.S.) 73, 77 (1864); *Dunphy v. Kleinsmith*, 11 Wall. (78 U.S.) 610 (1871)).

13. *Union Pac. R. Co. v. McShane*, 22 Wall. (89 U.S.) 444 (1874) (overruling *Kansas Pac. R. Co. v. Prescott*, 16 Wall. (83 U.S.) 603 (1873) (in part)).

14. *County of Cass v. Johnston*, 95 U.S. 360 (1877) (overruling *Harshman v. Bates County*, 92 U.S. 569 (1875)).

15. *Fairfield v. County of Gallatin*, 100 U.S. 47 (1879) (overruling *Town of Concord v. Savings-Bank*, 92 U.S. 625 (1875)).

16. *Tilghman v. Proctor*, 102 U.S. 707 (1880) (overruling *Mitchell v. Tilghman*, 19 Wall. (86 U.S.) 287 (1873)).

17. *Kilbourn v. Thompson*, 103 U.S. 168, 192-200 (1881) (overruling *Anderson v. Dunn*, 6 Wheat. (19 U.S.) 204 (1821)).

18. *United States v. Phelps*, 107 U.S. 320, 323 (1883) (overruling *Shelton v. The Collector*, 5 Wall. (72 U.S.) 113, 118 (1867)).

19. *Kountze v. Omaha Hotel Co.*, 107 U.S. 378, 387 (1883) (overruling *Stafford v. The Union Bank of Louisiana*, 16 How. (57 U.S.) 135 (1853)).

20. *Morgan v. United States*, 113 U.S. 476, 496 (1885) (overruling *Texas v. White*, 7 Wall. (74 U.S.) 700 (1869).

21. *Wabash, S.L. & P. Ry. Co. v. Illinois*, 118 U.S. 557 (1886) (overruling *Peik v. Chicago & N.W. Ry. Co.*, 94 U.S. 164 (1877) ("substantially though not expressly overruled")).

22. *Phila. Steamship Co. v. Pennsylvania*, 122 U.S. 326 (1887) (overruling *State Tax on Railway Gross Receipts*, 15 Wall. (82 U.S.) 284 (1873) ("basic grounds of decision repudiated")).

23. *In re Ayers*, 123 U.S. 443 (1887) (overruling *Osborn v. Bank of the United States*, 9 Wheat. (22 U.S.) 738 (1824)).

24. *Leloup v. Port of Mobile*, 127 U.S. 640, 647 (1888) (overruling *Osborne v. Mobile*, 16 Wall. (83 U.S.) 479 (1873)).

25. *Leisy v. Hardin*, 135 U.S. 100, 118 (1890) (overruling *Peirce v. New Hampshire*, 5 How. (46 U.S.) 504 (1847)).

26. *Brenham v. German-American Bank*, 144 U.S. 173, 187 (1892) (overruling *Rogers v. Burlington*, 3 Wall. (10 U.S.) 654 (1866); *Mitchell v. Burlington*, 4 Wall. (71 U.S.) 270 (1867)).

27. *Roberts v. Lewis*, 153 U.S. 367, 377 (1894) (overruling *Giles v. Little*, 104 U.S. 291 (1881)).

28. *Pollock v. Farmer's Loan & Trust Co.*, 158 U.S. 601 (1895) (overruling *Hylton v. United States*, 3 Dall. (3 U.S.) 171 (1796)).

29. *Garland v. Washington*, 232 U.S. 642, 646 (1914) (overruling *Crain v. United States*, 162 U.S. 625 (1896)).

30. *United States v. Nice*, 241 U.S. 591, 601 (1916) (overruling *In re of Heff*, 197 U.S. 488 (1905)).

31. *Pennsylvania R.R. Co. v. Towers*, 245 U.S. 6, 17 (1917) (overruling *Lake Shore & M.S. Ry. Co. v. Smith*, 173 U.S. 684 (1899) (in part)).

32. *Rosen v. United States*, 245 U.S. 467, 470 (1918) (overruling *United States v. Reid*, 12 How. (53 U.S.) 361 (1851)).

33. *Boston Store v. American Graphophone Co.*, 246 U.S. 8, 25 (1918); *Motion Picture Co. v. Universal Film Co.*, 243 U.S. 502, 518 (1917) (overruling *Henry v. Dick Co.*, 224 U.S. 1 (1912)).

34. *Terrell v. Burke Constir. Co.*, 257 U.S. 529, 533 (1922) (overruling *Doyle v. Continental Ins. Co.*, 94 U.S. 535 (1877); *Security Mutual Life Ins. Co. v. Prewitt*, 202 U.S. 246 (1906)).

35. *Lee v. Chesapeake & Ohio Ry.*, 260 U.S. 653, 659 (1923) (overruling *Ex parte Wisner*, 203 U.S. 449 (1906); qualifying; *In re Moore*, 209 U.S. 490 (1908)).

36. *Alpha Cement Co. v. Massachusetts*, 268 U.S. 203, 218 (1925) (overruling *Baltic Mining Co. v. Massachusetts*, 231 U.S. 68 (1913)).

37. *Ches. & Ohio Ry. Co. v. Leitch*, 276 U.S. 429 (1928) (rehearing) (overruling *Chesapeake and Ohio Ry. Co. v. Leitch*, 275 U.S. 507 (1927) (not recorded)).

38. *Gleason v. Seaboard Ry.*, 278 U.S. 349, 357 (1929) (overruling *Friedlander v. Texas & Railway Co.*, 130 U.S. 416 (1889) (in part)).

39. *Farmers Loan Co. v. Minnesota*, 280 U.S. 204, 209 (1930) (overruling *Blackstone v. Miller*, 188 U.S. 189 (1903)).

40. *East Ohio Gas Co. v. Tax Comm.*, 283 U.S. 465, 472 (1931) (overruling *Penna. Gas Co. v. Pub. Service Comm.*, 292 U.S. 23 (1920)).

41. *Chicago & E.I.R. Co. v. Commission*, 284 U.S. 296 (1932) (overruling *Erie R.R. Co. v. Collins*, 253 U.S. 77 (1920); *Erie R.R. Co. v. Szary*, 253 U.S. 86 (1920)).

42. *Fox Film Corp. v. Doyal*, 286 U.S. 123 (1932) (overruling *Long v. Rockwood*, 277 U.S. 142 (1928)).

43. *New York ex rel. Northern Finance Corp. v. Lynch*, 290 U.S. 601 (1933) (overruling *Macallen Co. v. Massachusetss*, 279 U.S. 620 (1929). *See also United States v. City of Detroit*, 355 U.S. 466, 472 n. 2 (1958)).

44. *Funk v. United States*, 290 U.S. 371, 373, 386 (1933) (overruling *Stein v. Bowman*, 13 Pet. (38 U.S.) 209 (1839) (in part); *Hendrix v. United States*, 219 U.S. 79 (1911); *Logan v. United States*, 144 U.S. 263 (1892); *Jim Fuey Moy v. United States*, 254 U.S. 189 (1920)).

45. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (overruling *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); *Morehead v. N.Y. ex rel. Tipaldo*, 298 U.S. 587 (1936)).

46. *R.R. Comm. v. Pacific Gas Co.*, 302 U.S. 388 (1938) (rehearing) (overruling *Railroad Commission v. Pacific Gas Co.*, 301 U.S. 669 (1937) (not recorded)).

47. *Helvering v. Producers Corp.*, 303 U.S. 376 (1938) (overruling *Gillespie v. Oklahoma*, 257 U.S. 501 (1922); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393 (1932)).

48. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 69, 79 (1938) (overruling *Swift v. Tyson*, 16 Pet. (41 U.S.) 1 (1842)).

49. *Graves v. N.Y. ex rel. O'Keefe*, 306 U.S. 466 (1939) (overruling *Dobbins v. Erie County*, 16 Pet. (41 U.S.) 435 (1842); *Collector v. Day*, 11 Wall. (78 U.S.) 113 (1871); N.Y. ex rel. *Rogers v. Graves*, 299 U.S. 401 (1937); *Brush v. Commissioners*, 300 U.S. 352 (1937)).

50. *Rochester Tel. Corp. v. United States*, 307 U.S. 125 (1939) (overruling *Proctor & Gamble v. United States*, 225 U.S. 282 (1912)).

51. *O'Malley v. Woodrough*, 307 U.S. 277 (1939) (overruling *Evans v. Gore*, 253 U.S. 245 (1920)).

52. *Madden v. Kentucky*, 309 U.S. 83 (1940) (overruling *Colgate v. Harvey*, 296 U.S. 404 (1935)).

53. *Helvering v. Hallock*, 309 U.S. 106 (1940) (overruling *Helvering v. St. Louis Trust Co.*, 296 U.S. 39 (1935); *Becker v. St. Louis Trust Co.*, 296 U.S. 48 (1935)).

54. *Tigner v. Texas*, 310 U.S. 141 (1940) (overruling *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540 (1902)).

55. *United States v. Darby*, 312 U.S. 100 (1941) (overruling *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (limited)).

56. *United States v. Chicago, M.St. P. & P.R. Co.*, 312 U.S. 592 (1941) (overruling *United States v. Lynch*, 188 U.S. 445 (1903) (in part); *United States v. Heyward*, 250 U.S. 633 (1919) (not recorded)).

57. *Nye v. United States*, 313 U.S. 33 (1941) (overruling *Toldeo Newspaper Co. v. United States*, 247 U.S. 401 (1918)).

58. *California v. Thompson*, 313 U.S 109 (1941) (overruling *Di Santo v. Pennsylvania*, 273 U.S. 34 (1927)).

59. *United States v. Classic*, 313 U.S 299 (1941) (overruling *Newberry v. United States*, 256 U.S. 232 (1921)).

60. *Olsen v. Nebraska*, 313 U.S. 236 (1941) (overruling *Ribnik v. McBride*, 277 U.S. 250 (1928)).

61. *Alabama v. King & Boozer*, 314 U.S. 1 (1941) (overruling *Panhandle Oil Co. v. Knox*, 277 U.S. 219 (1928); *Graves v. Texas Company*, 298 U.S. 393 (1936)).

62. *Toucey v. N.Y. Life Ins. Co.*, 314 U.S. 118 (1941) (overruling *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921)).

63. *Edwards v. California*, 314 U.S. 160 (1941) (overruling *City of New York v. Miln*, 11 Pet. (36 U.S.) 103 (1837)).

64. *State Tax Comm. v. Aldrich*, 316 U.S. 174 (1942) (overruling *First National Bank v. Maine*, 284 U.S. 312 (1932)).

65. *Williams v. North Carolina*, 318 U.S. 287 (1942) (overruling *Haddock v. Haddock*, 201 U.S. 562 (1906)).

66. *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575 (1943) (overruling *Johnson v. Fleet Corporation*, 280 U.S. 320 (1930)).

67. *Jones v. Opelika*, 319 U.S. 103 (1943) (re-argument); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (overruling *Jones v. Opelika*, 316 U.S. 584 (1942)).

68. *Oklahoma Tax Comm. v. United States*, 319 U.S. 598 (1943) (overruling *Childers v. Beaver*, 270 U.S. 555 (1926)).

69. *Board of Education v. Barnette*, 319 U.S. 624 (1943) (overruling *Minersville District v. Gobitis*, 310 U.S. 586 (1940)).

70. *FPC v. Hope Gas Co.*, 320 U.S. 591 (1944) (overruling *United Railways v. West*, 280 U.S. 234 (1930 (in part)).

71. *Mercoid Corp. v. Mid-Continent Co.*, 320 U.S. 661 (1944) (overruling *Leeds & Catlin Co. v. Victor Talk. Mach. (no. 2)*, 213 U.S. 325 (1909) (limited)).

72. *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944) (overruling *Plamals v. Pinar Del Rio*, 277 U.S. 151 (1928) (in part)).

73. *Smith v. Allwright*, 321 U.S. 649 (1944) (overruling *Grovey v. Townsend*, 295 U.S. 45 (1935)).

74. *United States v. Southeastern Underwriters' Assn.*, 322 U.S. 533 (1944) (overruling *Paul v. Virginia*, 8 Wall. (75 U.S.) 168 (1869); *United States v. Schwimmer*, 279 U.S. 644 (1929)).

75. *Girouard v. United States*, 328 U.S. 61 (1946) (overruling *United States v. MacIntosh*, 283 U.S. 605 (1931); *United Stats v. Bland*, 283 U.S. 636 (1931)).

76. *Halliburton Co. v. Walker*, 3298 U.S. 1 (1946) (rehearing) (overruling *Halliburton Co. v. Walker*, 326 U.S. 696 (1946)).

77. *MacGregor v. Westinghouse Co.*, 329 U.S. 402 (1947) (rehearing) (overruling *MacGregor v. Westinghouse Co.*, 327 U.S. 758 (1946)).

78. *Angel v. Buelington*, 330 U.S. 183 (1947) (overruling *David Lupton's Sons v. Auto. Club of Am.*, 225 U.S. 489 (1912) (rendered obsolete by prior change in law)).

79. *Zap v. United States*, 330 U.S. 800 (1947) (rehearing) (overruling *Zap v. United States*, 328 U.S. 624 (1946)).

80. *Thibaut v. Car and General Ins. Corp.*, 332 U.S. 828 (1947) (on rehearing) (overruling *Thibaut v. Car and General Ins. Corp.*, 332 U.S 751 (1947)).

81. *Sherrer v. Sherrer*, 334 U.S. 343 (1948) (overruling *Andrews v. Andrews*, 188 U.S. 14 (1908) (in part)).

82. *Lincoln Federal Labor Union v. Northwestern*, 335 U.S. 525 (1949) (overruling *Adair v. United States*, 208 U.S. 161 (1908)) *See also Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941) (overruling *Coppage v. Kansas*, 236 U.S. 1 (1915)).

83. *Comr. v. Estate of Church*, 335 U.S. 632, 637 (1949) (overruling *May v. Heiner*, 281 U.S. 238 (1930)).

84. *Ott v. Mississippi Barge Line*, 336 U.S. 169 (1949) (overruling *St. Louis v. Ferry Company*, 11 Wall. (78 U.S.) 423 (1870); *Old Dominian Steamship Co. v. Virginia*, 198 U.S. 299 (1905); *Ayer & Lord Co. v. Kentucky*, 202 U.S. 409 (1906)).

85. *Oklahoma Tax Comm. v. Texas Co.*, 336 U.S. 342 (1949) (overruling *Choctaw & Gulf R.R. v. Harrison*, 235 U.S. 292 (1914); *Indian Oil Co. v. Oklahoma*, 240 U.S. 522 (1916); *Howard v. Gipsy Oil Co.*, 247 U.S. 503 (1918); *Large Oil Co. v Howard*, 248 U.S. 549 (1919); *Oklahoma v. Barnsdall Corp.*, 296 U.S. 521 (1936)).

86. *Cosmopolitan Co. v. McAllister*, 336 U.S. 783 (1949) (overruling *Hust v. Moore-McCormack Lines*, 328 U.S. 707 (1946)).

87. *United States v. Rabinowitz*, 339 U.S. 56, 66, 85 (1950) (overruling *Trupiano v. United States*, 334 U.S. 699 (1948); *McDonald v. United States*, 335 U.S. 451 1948)).

88. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (overruling *Mutual Film Corp. v. Ohio Indus'l Comm.*, 236 U.S. 230 (1915)).

89. *Brown v. Board of Education*, 347 U.S. 483, 491, 494-495 (1954) (overruling *Cumming v. Board of Education*, 175 U.S. 528 (1899); *Gong Lum v. Rice*, 275 U.S. 78 (1927)).

90. *In re Disbarment of Isserman*, 348 U.S. 1 (1954) (on rehearing) (overruling *In re Isserman*, 345 U.S. 286 (1953)).

91. *Gayle v. Browder*, 352 U.S. 903 (1956) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

92. *Reid v. Covert*, 354 U.S. 1 (1957) (overruling *Kinsella v. Krueger*, 351 U.S. 470 (1956); *Reid v. Covert*, 351 U.S. 487 (1956)).

93. *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 419 (1957) (overruling *Thompson v. Thompson*, 226 U.S. 551 (1913)). *See also Armstrong v. Armstrong*, 350 U.S. 568, 581 (1956)).

94. *Ladner v. United States*, 358 &U.S. 169 (1958) (rehearing) (overruling *Ladner v. United States*, 355 U.S. 282 (1958)).

95. *United States v. Raines*, 362 U.S. 17, 27 (1960) (overruling *United States v. Reese*, 92 U.S. 214, 220-221 (1876)).

96. *Elkins v. United States*, 364 U.S. 206, 210, 212-213, 283 (1960); *Rios v. United States*, 364 U.S. 253 (1960) (overruling *Weeks v. United States*, 282 U.S. 386, 398 (1914) (in part); *Center v. United States*, 267 U.S. 575 (1925); *Byars v. United States*, 273 U.S. 28, 33 (1927) (in part); *Feldman v. United States*, 322 U.S. 487, 492 (1944) (in part)).

97. *James v. United States*, 366 U.S. 213, 215, 221, 223, 241 (1961) (overruling *CIR v. Wilcox*, 327 U.S. 404 (1946)).

98. *Mapp v. Ohio*, 367 U.S. 643, 653-655 (1961) (overruling *Wolf v. Colorado*, 338 U.S. 25 (1949) (in part)); *See also Ker v. California*, 374 U.S. 23, 45, 53, 59 (1963) (overruling *Irving v. California*, 347 U.S. 128 (1954) (in part)).

99. *Baker v. Carr*, 369 U.S. 186, 277, 280 (1962) (overruling *Colegrove v. Green*, 328 U.S. 549 (1946) (in part)).

100. *Wesberry v. Sanders*, 376 U.S. 1 (1964) (overruling *Colegrove v. Barrett*, 330 U.S. 804 (1947)).

101. *Smith v. Evening News Assn.*, 371 U.S. 195, 199 (1962) (overruling *Westinghouse Employees v. Westinghouse Corp.*, 348 U.S. 437 (1955) (in part)). *See also Truck Drivers Union v. Riss & Co.*, 372 U.S. 517, 520 (1963).

102. *Construction Laborers v. Curry*, 371 U.S. 542, 552, 554 (1963) (overruling *Building Union v. Ledbetter Co.*, 344 U.S. 178 (1952) (in part)).

103. *Gideon v. Wainwright*, 372 U.S. 335, (1963) (overruling *Betts v. Brady*, 316 U.S. 455 (1942)).

104. *Gray v. Sanders*, 372 U.S. 368, 383 (1963) (overruling *Cook v. Fortson, Turman v. Duckworth*, 329, U.S. 675 (1946); *South v. Peters*, 339 U.S. 276 (1950); *Cox v. Peters*, 342 U.S. 936 (1952); *Hartsfeld v. Sloan*, 357 U.S. 916 (1958)).

105. *Fay v. Noia*, 372 U.S. 391, 435 (1963) (overruling *Darr v. Burford*, 339 U.S. 200 (1950) (in part)).

106. *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963) (overruling *Adams v. Tanner*, 244 U.S. 590 (1917)).

107. *Schneider v. Rusk*, 377 U.S. 163 (1964) (overruling *Mackenzie v. Hare*, 239 U.S. 299 (1915)).

108. *Malloy v. Hogan*, 378 U.S. 1, 6 (1964) (overruling *Twining v. New Jersey*, 311 U.S. 78 (1908); *Adamson v. California*, 332, U.S. 46 (1947)).

109. *Murphy v. Waterfront Comm.*, 378 U.S. 52, 57, 77 (1964) (overruling *Jack v. Kansas*, 199 U.S. 372 (1905); *United States v. Murdock*, 284 U.S. 141 (1931); *Feldman v. United States*, 322 U.S. 487 (1944); *Knapp v. Schweitzer*, 357 U.S. 371 (1958); *Mills v. Louisiana*, 360 U.S. 230 (1959)).

110. *Jackson v. Denno*, 378 U.S. 368, 391 (1964) (overruling *Stein v. New York*, 346 U.S. 156 (1953)).

111. *Escobedo v. Illinois*, 378, U.S. 478, 491-492 (1964) (overruling *Crooker v. California*, 357 U.S. 433 (1958); *Cicenia v. LaGay*, 357 U.S. 504 (1958)).

112. *Pointer v. Texas*, 380 U.S. 400, 406 (1965) (overruling *West v. Louisiana*, 194 U.S. 258 (1904)).

113. *Gold v. DiCarlo*, 380 U.S. 520 (1965) (overruling *Tyson & Bro. v. Banton*, 273 U.s. 418 (1927)).

114. *Swift & Co. v Wickham*, 382 U.S. 111 (1965) (overruling *Kesler v. Dept of Public Safety*, 369 U.S. 153 (1962)).

115. *Harris v. United States*, 382 U.S. 162 (1965) (overruling *Brown v. United States*, 359 U.S. 41 (1959)).

116. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (overruling *Breedlov v. Suttles*, 302 U.S. 277 (1937); *Butler v. Thompson*, 341 U.S. 937 (1951)).

117. *Spevack v. Klein*, 385 U.S. 511 (1967) (overruling *Cohen v. Hurley*, 366 U.S. 177 (1961)).

118. *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (overruling *Adler v. Board of Education*, 342 U.S. 485 (1952)).

119. *Afroyim v. Rusk*, 387 U.S. 253 (1967) (overruling *Perez v. Brownell*, 356 U.S. 44 (1958)).

120. *Warden v. Hayden*, 387 U.S. 294 (1967) (overruling *Gouled v. United States*, 255 U.S. 298 (1921)).

121. *Camara v. Municipal Court*, 387 U.S. 523 (1967) (overruling *Frank v. Maryland*, 359 U.S. 360 (1959)).

122. *Berger v. New York*, 388 U.S. 41 (1967) (overruling *Olmstead v. United States*, 277 U.S. 437 (1928) (in part)).

123. *Katz v. United States*, 389 U.S. 347 (1967) (overruling *Olmstead v. United States*, 277 U.S. 438 (1928)).

124. *Peyton v. Rowe*, 391 U.S. 54 (1968) (overruling *McNally v. Hill*, 293 U.S. 131 (1934)).

125. *Bruton v. United States*, 391 U.S. 123 (1968) (overruling *Delli Paoli v. United States*, 352 U.S. 232 (1957)).

126. *Duncan v. Louisiana*, 391 U.S. 145 (1968) (overruling *Maxwell v. Dow*, 176 U.S. 581 (1900)).

127. *Carafax v. LaVallee*, 391 U.S. 234 (1968) (overruling *Parker v. Ellis*, 362 U.S. 574 (1960)).

128. *Lee v. Florida*, 392 U.S. 378 (1968) (overruling *Schwartz v. Texas*, 344 U.s. 199 (1952)).

129. *Jones v. Alfred H. Mayer Co.*, 382 U.S. 409, 441-443 (1968) (overruling *Hodges v. United States*, 203 U.S. 1 (1906)).

130. *Moore v. Ogilvie*, 394 U.S. 814 (1969) (overruling *MacDougall v. Green*, 335 U.S. 281 (1948)).

131. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (overruling *Whitney v. California*, 274 U.S. 357 (1927)).

132. *Chimel v. California*, 395 (U.S. 752 (1969) (overruling *Harris v. United States*, 331 U.S. 145 (1947); United *States v. Rabinowitz*, 339 U.S. 56 (1950)).

133. *Benton v. Maryland*, 395 U.S. 784 (1969) (overruling *Palko v. Connecticut*, 302 U.S. 319 (1967)).

134. *Ashe v. Swenson*, 397 U.S. 436 (1970) (overruling *Hoog v. New Jersey*, 356 U.S. 464 (1958)).

135. *Boys Markets v. Retail Clerks Union*, 398 U.S. 235 (1970) (overruling *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962)).

136. *Prince v. Georgia*, 398 U.S. 323, 329-330 (1970) (overruling *Brantley v. Georgia*, 217 U.S. 284 (1910)).

137. *Moragne v. States Marine Lines*, 398 U.S. 375 (1970) (overruling *The Harrisburg*, 119 U.S. 199 (1886)).

138. *Williams v. Florida*, 399 U.S. 78 (1970) (overruling in part *Thompson v. Utah*, (170 U.S.) 343 (1898), *Rassmussen v. United States*, 197 U.S. 516 (1905)).

139. *Blonder-Tongue Labs v. Univ. of Ill. Foundation*, 402 U.S. 313 (1971) (overruling *Triplett v. Lowell*, 297 U.S. 638 (1936)).

140. *Andrews v. L. & N.R. Co.*, 406 U.S. 320 (1972) (overruling *Moore v. Ill. Cent. R. Co.*, 312 U.S. 630 (1941)).

141. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974) (overruling in part *Fuentes v. Shevin*, 407 U.S. 67 (1972)).

142. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (overrulling *Northwestern Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1907); *Western Turf Asssociation v. Greenberg*, 204 U.S. 359, 363; *See also Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925)).

143. *Perez v. Campbell*, 402 U.S. 637, 91 S.Ct. 1704, 29 L.Ed.2d 233 (1971) (overruling *Kesler v. Dept of Public Safety*, 369 U.S. 153, 82 S.Ct. 807, 7 L.Ed.2d 641 (1962)).

144. *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972) (overruling *Pope v. Williams*, 193 U.S. 621, 24 S.Ct. 573, 48 L.Ed. 817 (1904)).

145. *Lehnkausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973) (overruling *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 48 S.Ct. 553, 72 L.Ed. 927 (1928)).

146. *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) (overruling *A book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General*, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1

(1966)).

147. *North Dakota Pharmacy Board v. Snyder's Drug Stores*, 414 U.S. 156, 94 S.Ct. 407, 38 L.Ed.2d 379 (1973) (overruling *Liggett Co. v. Baldridge*, 278 U.S. 105, 49 S.Ct. 57, 73, L.Ed. 204 (1929)).

148. *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) (overruling *Shapiro v. Thompson*, 394 U.S. 6128, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) (in part)).

149. *State Dept. of Health & Rehabilitative Services v. Zarate*, 407 U.S. 918, 92 S.Ct. 2462, 32 L.Ed.2d 803 (1972); and *Sterrett v. Mothers' & Children's Rights Organization*, 409 U.S. 809, 93 S.Ct. 68, 34 L.Ed.2d 70 (1972):

150. *Taylor v. Louisiana*, 419 U.S. 522, 95 S.t. 692, 42 L.Ed.2d 690 (1975) (overruling *Hoyt v. Florida*, 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed.21d 118 (1961) (in effect)).

151. *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 96 S.Ct. 535, 46 L.Ed.2d 495 (1976) (overruling *Low v. Austin*, 13 Wall. 29, 20 L.Ed. 517 (1872)).

152. *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) (overruling *Valentine v. Chrestensen*, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262 (1942)).

153. *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976) (overruling *Maryland v. Wirtz*, 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968)).

154. *New Orleans v.Dukes*, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976) (overruling *Morey v. Doud*, 354 u.S. 457, 77 S.Ct. 1344, 1 L.Ed.2d 1485 (1957);

155. *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976) (overruling *Goesaert v. Cleary*, 335 U.S. 464,

69 S.Ct. 197, 92 L.Ed. 163 (1948);

156. *Complete Auto Transit v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977) (overruling *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 71 S.Ct. 508, 95 L.Ed. 573 (1951);

157. *Schaeffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977) (overruling *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565 (1878)).

158. *Dept. of Revenue of Washington v. Washington Stevedoring Cos.*, 435 U.S. 734, 98 S.Ct. 1388, 55 L.Ed.2ds 682 (1978) (overruling *Puget Sound Stevedoring Co. v. State Tax Commn.*, 302 U.S. 90, 58 S.Ct. 72, 82, L.Ed. 68 (1937)).

159. *United States v. Scott*, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978) (overruling *United States v. Jenkins*, 420 U.S. 358, 95 S. Ct. 1006, 43 L.Ed.2d 250 (1975)).

160. *Hughes v. Oklahoma*, 441 U.S. 322, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979) (overruling *Geer v. Connecticut*, 161 U.S. 519, 16 S.Ct. 600, 40 L.Ed.793 (1896)).

161. *United States v. Salvucci*, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980) (overruling *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960)).

162. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981) (overruling *Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 43 S.Ct. 83, 67 L.Ed. 237 (1922)).

163. *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) (overruling *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964)).

164. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984) (overruling *Rolston v. Missouri Fund Comm'rs.*, 120 U.S. 390, 7 S.Ct.

499, 30 L.Ed. 721 (1887) (in part)).

165. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 104 S.Ct. 1099, 79 L.Ed.2d 361 (1984) (overruling *Coffey v. United States*, 116 U.S. 436, 6 S.Ct. 437, 29 L.Ed. 684 (1886)).

166. *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (overruling *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976)).

167. *United States v. Miller*, 471 U.S. 130, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985) (overruling in part *Ex parte Bain*, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887)).

168. *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) (overruling *Parratt v. Taylor*, 451 U.S. 527, 1010 S.Ct. 1908, 68 L.Ed.2d 420 (1981) (in part)).

169. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1868) (overruling *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965) (in part)).

170. *Solorio v. United States*, 483 U.S. 435, 107 S.Ct. 2924, 97 L.Ed.2d364 (1987) (overruling *O'Callahan v. Parker*, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969)).

171. *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987) (overruling *Parden v. Terminal Railway of Alabama Docks Dept.*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964)(in part)).

172. *South Carolina v. Baker*, 485 U.S. 505, 108 S.Ct. 1355, 99 L.Ed.2d 592 (1988) (overruling *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 15 S.Ct. 673, 39 L.Ed. 759 (1895)).

173. *Thornburgh v. Abbott*, 490 U.S. 401, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989) (overruling *Procunier v. Martinez*, 416

U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974) (in part)).

174. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, ___ U.S. ___, 112 S.Ct. 2791, 2823 (1992) (overruling *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S.; at 762, 106 S.Ct. at 2179 and Akron I, 462 U.S. 416, 103 S.Ct. 2481.

APPENDIX B

REPRESENTATIVE SCIENTIFIC AUTHORITIES WHICH CONCUR THAT LIFE BEGINS AT CONCEPTION

1. Audesirk, G.; and Audesink, T. *Biology: Life on Earth*. 2nd ed. New York: Macmillian Publishing Company, 1989.

   "A single lucky sperm may succeed in fertilizing it, starting the development of a new human being." p. 587

   "Fertilization occurs as the haploid nuclei of sperm and egg fuse, forming a diploid nucleus that contains all the genes of a new human being." p. 588

2. Nelson, G.E. *Biological Principles with Human Applications* 3rd ed. New York: John Wiley & Sons, 1989.

   "Since the parents differed genetically from each other, the zygote contains the genetic blueprint, so to speak, for a unique individual." p. 247

   "Whatever the number of genes, there are obviously enough to direct the formation of the whole human animal from a fertilized egg ... ." p. 288

   "An additional source of variation arises when a sperm and an egg unite. This recombination of a genetic materials adds to the pool of variation because no two eggs or sperm cells carry precisely the same genes. Therefore each recombination creates a unique individual." p. 288

3. Jennett, S. *Human Physiology*. New York: Churchill Livingstone, 1989.

   "The life of an individual begins at conception, the fertilization of an ovum by a spermatozoon." p. 409

4. Moore, K. *Before We Are Born* 3rd ed. Philadelphia: W.B. Saunders Company, 1989.

"Human development begins at fertilization when a male gamete or sperm fuses with a female gamete or ovum to form a zygote. The zygote is the first cell of a new human being." p. 25

"The male and female pronuclei fuse and the maternal and paternal chromosomes intermingle. The new diploid cell is called a zygote. It is the primordium of a human being." pp. 25-26

"Fusion of the two haploid gametes or germ cells (each with 23 chromosomes) produces a zygote, which is a diploid cell with 46 chromosomes, the normal number for the human species." p. 26

"Because half the chromosomes in the zygote come from the mother and the other half from the father, the zygote contains a new combination of chromosomes that differs from that of either of the parents. Consequently, fertilization forms the basis of biparental inheritance and ensures variation of the human species." p. 26

"The embryos chromosomal sex is determined at fertilization by the kind of sperm that fertilizes the ovum." p. 28

"Hence, it is the father rather than the mother whose gamete determines the sex of the embryo." p. 28

"Fertilization of the ovum by a sperm also initiates early human development by stimulating the zygote to undergo mitotic cell division or cleavage into two cells called blastomeres." p. 28

"Fertilization of the ovum usually occurs in the ampulla of the uterine tube. The process is complete when the haploid male and female pronuclei of the sperm and ovum, respectively, fuse to form a zygote. This diploid cell is the beginning of a new human being." p. 31

5. Thibodeau, G.A.; and Anthony, C.P. *Structure and Function of the Body* 8th ed. St. Louis: Times Mirror/Mosby College Publishers, 1988.

"The science of the development of the individual before birth is called embryology. It is a story of miracles, describing the means by which a new human life is started and the steps by which a single microscopic cell is transformed into a complex human being." pp. 409-410

"Genetically the zygote is complete. It represents a new single celled individual."

6. Thibodeau, G. *Anatomy and Physiology*. St. Louis: Times Mirror/Mosby College Publishing, 1987.

"Half of the 46 chromosomes in the zygote nucleus have come from the sperm and half from the ovum. Since chromosomes are composed of genes, the new being inherits half of its genes and the characteristics they determine from its father and half from its mother. Genetically, the zygote is complete. Time and nourishment are all that is needed for expression of those characteristics such as sex, body build, and skin color that were determined at fertilization." p. __

7. Scarr, S.; Weinberg, R.A.; and Levine A. *Understanding Development*. Harcourt Brace Jovanovich, Inc., 1986.

"The development of a new human being begins when a male's sperm pierces the cell membrane of a female's ovum, or egg." p. 86

"The villi become the placenta, which will nourish the developing infant for the next eight and a half months." p. 86

8. Craig, G. *Human Development* 4th ed. Englewood Cliffs, NJ: Prentice-Hall, 1986.

"Human development begins at the moment of conception." p. 57

"Here, we will look at the process of fertilization that marks the beginning of the life cycle of a human being." p. 57

9. Schuster, S.h.; and Asburn, S.S. *The Process of Human Development: A Holistic Life-Span Approach* 2nd ed. Boston: Little, Brown, and Company, 1986.

"Each individual begins life as a single cell that is formed by the union of two gametes - a sperm and an ovum (egg)." p. 50

"Characteristics are inherited according to specific laws, and the possibility of their occurrence in a new individual can be predicted." p. 58-59

10. Crouch, J.E. *Functional Human Anatomy* 4th ed. Philadelphia: Lea & Febiger, 1985.

"Development is a continuous process from conception (the fertilization of the ovum) to the death of the individual. For purposes of discussion, human development may be divided into two periods, prenatal development or embryology and postnatal development." p. 31

11. Gilbert, S.F. *Development Biology*. Sunderland, MA: Sinauer Associates, Inc., 1985.

"Fertilization is the process whereby two sex cells (gametes) fuse together to create a new individual with genetic potentials derived from both parents." p. 32

12. Clark, J. ed. *The Nervous System: Circuits of Communication In The Human Body*. Torstar Books, Inc., 1985.

"Each human begins life as a combination of two cells, a female ovum and a much smaller male sperm. This tiny unit, no bigger than a period on this page, contains all the

information needed to enable it to grow into the complex structure of the human body. The mother has only to provide nutrition and protection." p. 99

13. Clark, J.; ed. *Growth and Development: The Span of Life In The Human Body*. Torstar Books, Inc., 1985.

"... [T]here is absolutely no doubt at all that the story of the growth and development of a single being has its beginning at conception. This is the instant when a sperm from a human male enters and unites with an egg from a human female. The conceptual 'act of union' sets in motion a train of events of growth and development that only ends - perhaps more than a century later - when life itself ends." p. 9

"Fertilization brings together two sets of chromosomal material, one half the genetic blue print from the father, one half the genetic blueprint from the mother. Sperm and egg composition is so programmed that each sperm contains half the total gene complement of the father, each egg half that of the mother. This ensures that when egg and sperm fuse, a full complement of chromosomes exist in the newly fertilized egg. From this a new individual grows, ..." pp. 9-10

14. Clark, J.; ed. *Genetics and Heredity: The Blueprints of Life*, In *The Human Body*. Torstar Books, Inc., 1985.

"You are unique because the combination of your genes is unique, and nobody has exactly the same combination (even if you are an identical twin - although between such twins there are only subtle differences). Genes provide the fundamental information that determines how a person develops, although environmental acts to shape the final product form the moment of conception onward."

15. Turner, J.S.; and Helms, D.B. *Lifespan Developmental* 2nd ed. CBS College Publishing (Hold, Rinehart, and Winston), 1983.

"Yet far more remarkable than the birth itself is the process whereby a single fertilized egg develops into a fully functioning infant - complete with arms, legs, nose, eyes, ears, internal organs, and an individuality all of its own. The key to this magnificent story is a special code contained in the nucleus of a cell. This code, unique and different for every individual, is just now becoming understood by scientists." p. 52

"Each species of plant and animal and every individual within a species has a full set of directions locked inside its nucleus. This is what makes a mouse different from a bird, a flower different from a tree, and siblings different from each other." p. 52

"A zygote (a single fertilized egg cell) represents the onset of pregnancy and the genesis of a new life." p. 53

16. Volpe, E.P. *Biology and Human Concerns* 3rd ed. Dobuque, Iowa: Wm. C. Brown Company Publishers, 1983.

"Although the egg is many times greater in volume than the sperm, the two have equal potentialities as far as inheritance is concerned. The blueprints for traits are carried in the nucleus of each gamete (the mature sex cell - egg or sperm). The genetic characteristics of the future child are established at the time the sperm nucleus unites with the egg nucleus." p. 18

"The fertilized egg is genetically different from both parents, and one could contend that biological life commences at the moment of conception." p. 19

"The traits of an individual are largely determined by the genetic composition of the individual. A specific genetic code is locked into each cell of an individual of the very moment of the union of the sperm and egg nuclei." p. 20

17. Bernstein, R. and Bernstein, S. *Biology: The Study of Life*. New York: Harcourt Brace Jovanovick, Inc., 1982.

"The sets of genes carried by offspring produced by sexual reproduction differ from each other and from the sets carried by either parent." p. 544.

"Within 12 hours after sperm penetration the nuclei of the sperm and the egg fuse together, restoring the appropriate number of chromosomes for body cells. All of the genes that will determine the characteristics of the offspring are now present in a single nucleus, and the sex of the offspring is established." p. 584

18. Goldenring, J.M. *Development of the Fetal Brain*. 307 The New England Journal of Medicine 564(1982).

"I suggest that as physicians we should view human existence as a continuum from the first cell division of the fertilized ovum until the death of the last cell in the [human] organism." p. 564

19. Bryant, N.J. *Disputed Paternity*. New York: Brian C. Decker, a Division of Thieme-Stratton, Inc., 1980.

"The newly formed cell (which is known as a zygote) represents the beginning of life."

20. Mussen, P.H.; Conger, J.J.; and Kagan, J. *Child Development and Personality* 5th ed. New York: Harper & Row, 1979.

"The life of each individual begins when a sperm cell from the father penetrates the wall of an ovum, or egg, from the mother." p. 52

"Life begins at conception. But what of the forces that, throughout the individual's existence, will influence his or her development? When do they begin? The answer, again, is at conception. At the moment that the tiny tadpole-shaped sperm penetrates the wall of the ovum, it releases 23 minute particles called chromosomes. At approximately the same time, the nucleus, the inner core of the ovum, breaks up, releasing 23 chromosomes of its

own." pp. 52-53

"This process is of great interest to us because it has been established through painstaking research that these chromosomes, which are further subdivided into even smaller particles called genes, are the carriers of the child's heredity. All the child's biological heritage from the father and mother is contained in these 46 chromosomes." p. 53

21. Parker, S. *Life Before Birth: The Story of the First Nine Months*. Cambridge: Cambridge University press, 1979.

"The fertilized egg is smaller than a pinhead, but inside it, in the chromosomes, are all the instructions and information needed for a new human being to develop." p. 8

"The egg cell nucleus also releases its chromosomes, and both sets line up in the middle of the cell. This is the moment of fertilization, when a new life comes into being." p. 12 (emphasis added)

22. Harlock, E.B. *Child Development* 6th ed. McGraw-Hill, Inc., 1978.

"Life begins at the moment of conception - the time when a female reproductive cell, the ovum (plural, ova), is fertilized by a male reproductive cell, the spermatozoon (plural, spermatozoa)." p. 51

"The first important condition occurring at the time of conception, when the ovum is fertilized by the spermatozoon, is the determination of the newly created individual's hereditary endowment. When the sperm unites with the ovum, everything the newly conceived individual will ever inherit from parents, grandparents, and other more remote ancestors is set." p 53

"After conception, nothing can be done to add to, or subtract from, the individual's hereditary endowment." p 54

23. Strand, F.L. *Physiology: A Regulatory Systems Approach*. New York: Macmillan Publishing Company, Inc., 1978. "The instant of fusion of the sperm nucleus with that of the ovum initiates a fascinatingly complex series of reactions which ultimately are designed to bring to full development an individual of the same species as the parents, bearing all the characteristics of his progenitors but individually different in a multitude of small ways. At this important instant, the genetic sex has also been determined." p. 542

"The cell has formed a new, mature individual, and we have come full cycle." p. 542

24. Fitzgerald, H.E.; Strommen, E.A.; and McKinney, J.P. *Developmental Psychology: The Infant and Young Child.* Homewood, IL: The Dorsey Press, 1977.

"In the normal human being, each cell is diploid, which means that it contains pairs of chromosomes - 23 pairs, or a total of 46 chromosomes." ... "Each parent contributes one half of the chromosomes complement to the new organism." p. 26

"During meiosis two phenomena occur which effectively guarantee that the new individual will be genetically unique. One of the phenomena, crossing-over, occurs when the chromosomes pair up. The other, segregation, occurs when the chromosomes begin to separate." p. 26

25. Pikunas, J. *Human Development: An Emergent Science*. McGraw-Hill, Inc., 1976.

"The union of ovum and sperm nuclei defines the hereditary endowment." p. 111

"The development of the child begins at conception, about nine months before birth." p. 111

26. Mader, S.S. *Inquiry into Life*. Dobuque, Iowa: Wm. C. Brown Company Publishers, 1976.

"Each gamete, you'll recall, contains the haploid number of chromosomes, and the fertilized egg, or zygote, contains the diploid number of chromosomes as the new individual now begins development." p. 433 (emphasis added)

27. Sussman, L.N. *Paternity Testing By Blood Grouping*. Springfield, IL: Charles C. Thomas Publisher, 1976.

"A complete cell called a zygote with its normal complement of twenty-three pairs of chromosomes is formed and a new somatic cell series - thus a new individual - begins."

28. Munsinger, H. *Fundamentals of Child Development* 2nd ed. New York: Holt, Rinehart, and Winston, Inc., 1975.
"Human life begins at Conception." p. 4

"Human life begins when one of many available sperm from a male succeeds in penetrating the wall of an ovum (egg) inside the female. The combination of material from the two parents, which determines what characteristics the new individual will inherit, begins a complicated sequence of development which will one day produce a mature human adult." p. 4

"Mendel assumed that a full set of genes comes from each parent as part of the fertilized egg (the zygote). This double set of genes is the genotype, the hereditary make up of the new individual." p. 42

29. Bernard, H.W. *Human Development in Western Culture* 4th ed. Boston: Allyn & Bacon, Inc., 1975.

"The life of a given individual begins when the sperm (male cell) penetrates the ovum (female cell)." p. 37

"Whatever biological potential is received from parents crosses this narrow hereditary bridge at the moment of conception." p. 40

30. Anthony C.P.; and Kolthoff, N.J. *Textbook of Anatomy and Physiology* 9th ed. St. Louis: the C.V. Mosby Company, 1975.

"The sperm head then forms itself into a nucleus that approaches and eventually fuses with the nucleus of the ovum, producing, at that moment, a new single-celled individual or zygote. Half of the 46 chromosomes in the zygote nucleus have come from the sperm and half from the ovum. Since chromosomes are composed of genes, the new being inherits half of its genes and the characteristics they determine from its father and half from its mother." p. 500

31. Goin, C.J.; and Goin, O.B. *Man and the Natural World* 2nd ed. New York: Macmillan Publishing Co., Inc., 1975.

"It is the resultant zygote that, by repeated mitotic cell divisions, will give rise to the adult of the next generation. This one of the most amazing facts of biology - that a single cell, by dividing and dividing and dividing again, can give rise to sometimes billions of cells of many different kinds and yet so precisely arranged that the resultant organism is not only a smoothly functioning individual but an individual of the same kind as the parent." p. 183

32. Lugo, J.O.; and Hershey, G.L. *Human Development: A Multi-Disciplinary Approach to the Psychology of Individual Growth*. New York: Macmillan Publishing Co., Inc., 1974.

"The growth of every human being begins with a special cell, the fertilized ovum. Although the diameter of the ovum is approximately 1/175 of an inch and its weight is about one 20-millionth of an ounce, all the genetic potentialities for the complete development of a human being are contained within it. From this microscopically small cell, a baby composed of about 200 billion cells of different kinds will develop during the next nine months. This striking phenomenon of growth is common in all human beings." p. 242

33. Kaluger, G.; and Kaluger, M. *Human Development: The Span of Life*. St. Louis: The C.V. Mosby Company, 1974.

"In that fraction of a second when the chromosomes form pairs, the sex of the new child will be determined, hereditary characteristics received from each parent will be set, and a new life will have begun." pp. 28-29

34. DeCoursey, R.M. *The Human Organism* 4th ed. McGraw-Hill, Inc., 1974.

"The zygote therefore contains a new arrangement of genes on the chromosomes never before duplicated in any other individual. The offspring destined to develop from the fertilized ovum will have a genetic constitution different from that of either parent and from anyone else in the world." p. 584

APPENDIX C

States Which Recognize That The Life Of A Human Being Begins At Conception

Alabama:

Trent v. State, 15 Ala. App. 485, 488, 73 So. 834, 836 (1916) (interpreting state abortion law) ("'does not the new being, from the first day of its uterine life, acquire a legal and moral status that entitles it to the same protection as that guaranteed to human beings in extrauterine life?'") (quoting from the 1911 Transactions of the Medical Association of Alabama)

Wolfe v. Isbell, 291 Ala. 327, 331, 280 So.2d 758, 761 (1973) (rejecting viability requirement in wrongful death action where death occurs after live birth):

> [T]he more recent authorities emphasize that there is no valid medical basis for a distinction based upon viability, especially where the child has been born alive. These [decisions] proceed on the premise that the fetus is just as much an independent being prior to viability as it is afterwards, and that from the moment of conception, the fetus or embryo is not a part of the mother, but rather has a separate existence within the body of the mother.

Eich v. Town of Gulf Shores, 293 Ala. 95, 98-99, 300 So. 2d 354, 356-57 (1974) (rejecting live birth requirement in wrongful death action) (stating that "the paramount purpose of our wrongful death statutes . . . is the preservation of human life" and holding that "it is illogical to allow liability to depend on whether death from fatal injury occurred before or after live birth")

Alabama Constitutional Convention Call (S.J. Res. 9, 1980 Ala. Acts 396):

> [A]pplies to the Congress . . . to call a convention for the sole and exclusive purpose of proposing an amendment to the Constitution that would protect

> the lives of all human beings including unborn children at every stage of their biological development and providing that neither the United States nor any state shall deprive any human being, from the moment of fertilization, of the right to life without due process of laws, nor shall any state deny any human being, from the moment of fertilization, the equal protection of the laws, except where pregnancy results from rape or incest; or where abortion is necessary to save the life of the mother; or where testing revealed abnormality or deformity of the fetus.

Arizona:

Nelson v. Planned Parenthood Center of Tucson, 19 Ariz. App. 142, 505 P.2d 580, 586 (1973) (construing state abortion law):

> One cannot gainsay a legislative determination that an embryonic or fetal organism is 'life.' Once begun, the inevitable result is a human being, barring prior termination of the pregnancy.

Ariz. Rev. State., sec. 13-1103(A)(5) (West 1989) (defining offense of manslaughter to include "[k]nowingly or recklessly causing the death of an unborn child at any stage of its development by any physical injury to the mother of such child which would be murder if the death of the mother had occurred")

Arkansas:

Ark. Const., Amend. 68, sec. 2 ("[t]he public policy of Arkansas is to protect the life of every unborn child from conception until birth, ...")

Arkansas Constitutional Convention Call (Res. of Feb. 17, 1977, H.R.J. Res. 2):

> Requests Congress to call a convention to propose a constitutional amendment which would provide that every human being subject to the jurisdiction of the United States or any state shall be deemed from the moment of fertilizaton to be a person and entitled to the right of life; provides that Congress and the states shall have concurrent powers to enforce such an amendment.

California:

Cal. Pen. Code, sec. 187(a) (West 1988) ("[m]urder is the unlawful killing of a human being, or a fetus, with malice aforethought")

Cal. Civ. Code, sec. 29 (West 1982) ("[a] child conceived but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the even of its subsequent birth")

Scott v. McPheeters, 33 Cal. App. 2d 629, 634, 92 P.2d 678, 681 (1939) (it is "an established and recognized fact by science and by everyone of understanding" that "an unborn child is a human being separate and distinct from its mother")

Connecticut:

Conn. Gen. Stat., Ann. sec. 53-31(a) (1985) ("[t]he public policy of the state and the intent of the legilatur is to protect and preserve human life from the moment of conception") (rep. by P.A. 90-113, sec. 4 (1990))

Simon v. Mullin, 34 Conn. Sup. 139, 147, 380 A.2d 1353, 1357 (1977) (rejecting viability requirement in wrongful death action where death occurs after live birth) ("[t]he development of the principle of law that now permits recovery by or on behalf of a chil dborn alive for prenatal injuries suffered at any time after conception, without regard to the viability of the fetus, is a notable illustration of the viability of our common law")

Delaware:

Scott v. State, 49 Del. 401, 409-10, 117 A.2d 831, 835-36 (1955) (characterizing abortion law as one which defines an offense against the lives and persons of individuals)

Delaware Constitutional Convention Call (Res. of May 23, 1978), H.R. Con. Res. 9):

> Requests Congress to call a convention to propse a constitutional amendment that would protect the lives of all human beings, including unborn children at every stage of their biological development.

District of Columbia:

Bonbrest v. Kotz, 65 F. Supp. 138, 140 (D. D.C. 1946) (recognizing cause of action for prenatal injuries) ("[f]rom the viewpoint of the civil law, and the law of property, a child en ventre sa mere is not only regarded as [a] human being, but as such from the moment of conception--which it is in fact")

Greater Southeast Community Hosp. v. Wiliams, 482 A.2d 394, 396 (D.C. Ct. App. 1984) (rejecting viability requiremetn in wrongful death action where death occurs after live birth) (referring to "established medical fact that a fetus is a person

separate from its mother")

Florida:

Day v. Nationwide Mut. Ins. Co., 328 So.2d 560, 561 (1976) (rejecting viability requirement in case of prenatal injuries) (quoting with approval Prosser, Handbood of the Law of Torts, Sec. 55 at 336 (4th ed. 1971)):

> Viability of course does not affect the question of the legal existence of the foetus, and therefore of the defendant's duty; and it is a most unsatisfactory criterion, since it is a relative matter, depending upon the health of the mother and child and many other matters in addition to the stage of development. Certainly, the infant may be no less injured; and all logic is in favor of ignoring the stage at which it occurs.[1]

Georgia:

Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 504-05, 93 S.E.2d 727, 728 (1956) (rejecting viability requirement in case of prenatal injuries) ("[i]f a child born after an injury sustained at any period of its prenatal life can prove the effect on it of a tort, it would have a right to recover") (one dissent characterized majority opinion as holding, in effect, "that an infant becomes a 'person' from the moment of conception, with the right to sue for a tortious injury after its birth"), id. at 506, 93 S.E.2d at 729.

[1] To which to the Fifth Edition of Prosser & Keaton (1984) adds: "With recent advances in embryology and medical technology, medical proof of causation in these cases has become increasingly reliable, which argues for eliminating the viability or other arbitrary developmental requirement altogether." Id. at 369.

Morrow v. Scott, 7 Ga. 535, 537 (1849) ("[i]n ... general, a child is to be considered as in being, from the time of its conception, where it will be for the benefit of such child to be so considered")

Gulf Life Ins. Co. v. Brown, 181 Ga. App. 72, 74, 351 S.E.2d 267, 269 (1986) ("unquestionably, Georgia cases show a clear tendency toward placing a high premium on human life and an unmistakable willingness to recognize a fetus as a person at a time prior to actual delivery")

Idaho:

Nash v. Meyer, 54 Idaho 283, 301, 31 P.2d 273, 280 (1934) (construing state abortion law) (criminal abortion statute intended "to discourage abortions because thereby the life of a human being, the unborn child, is taken")

Blake v. Cruz, 108 Idaho 253, 261, 698 P.2d 315, 323 (1984) (Bistline, J., concurring in part and dissenting in part) ("[t]his Court recently committed itself to the proposition that an unborn child is a person in being," citing ~~Volk v. Baldazoi~~, 103 Idaho 570, 651 P2d 11 (1982) (rejecting live birth requiremetn in wrongful death action where death occurs after viability))

Idaho Constitutional Convention Call (S. Con. Res. 132, 45th Legis. 2d Sess, 1980 Idaho Sess. Laws 1005):

> Request[]s that the Congress . . . call a constitutional convention for the specific and exclusive purpose of proposing an amendment . . . [to provide that]:
>
> (a) From the moment of conception a person shall be guaranteed all personal rights extended to all individuals under the constitution and laws of the United States of America and the state or states of residence and only under extreme circumstances shall it be otherwise, namesly to save the life of the mother, or other extenuating circumstances where at least two consulting physicians, one not having

previously been involved in the case, and after due and thorough consultation with all persons having the legal right to be involved, find it is necessary and just that the life of the unborn shall be terminated.

(b) Provide that the several states shall have the power to enforce such an amendment and establish priority of life by appropriate legislation.

Illinois:

Ill. Ann. Stat., ch. 38, par. 81-21 (Smith-Hurd 1977) (preamble to Illinois Abortion Act of 1975):

> [T]he General Assembly of the State of Illinois do solemnly declare and find in reaffirmation of the longstanding policy of this State, that the unborn child is a human being from the moment of conception and is, therefore, a legal person, for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and Constitution of this State . . . .

Renslow v. Mennonite Hospital, 67 Ill.2d 348, 352-53, 367 N.E.2d 1250, 1252-53 (1977) (rejecting viability requirement in cause of action for prenatal injuries)

Ill. Rev. Stat., ch. 70, par. 2.2 (1991) (amending wrongful death statute to allow wrongful death action to be brought on behalf of an unborn child without regard to the stage of pregnancy when the child is injured or whether there is a live birth)

Ill. Rev. Stat., ch. 38, par. 9-1.2(b)(1) (1991) (defining "unborn child" as "any individual of the human species from fertilization until birth")

Ill. Rev. Stat., ch. 38, pars. 9-1.2, 9-2.1, 9-3.2, 12-3.2, 12-4.4 (1991) (amending criminal code to define broad range of crimes, including homicide, that can be committed against unborn child, regardless of gestational age)

Indiana:

Cheaney v. State, 259 Ind. 138, 145, 285 N.E.2d 265, 268 (1972) (construing state abortion law) ("[i]t is now established that some sort of independent life begins at conception," rejecting quickening and viability as outdated and arbitrary distinctions)

Cowe v. Forum Group, Inc., 541 N.E.2d 962, 967-68 (Ind. App. 1989), rev'd and remanded on other grounds, 575 N.E.2d 630 (Ind. 1991) (recognizing cause of action for prenatal injuries at any time after conception and rejecting viability requirement)

Kentucky:

Ky. Rev. Stat. Ann., sec. 311.710(5) (Michie/Bobbs-Merrill 1990):

> If . . . the United States constitution is amended or relevant judicial decisions are reversed or modified, the declared policy of this Commonwealth to recognize and to protect the lives of all human beings regardless of their degree of biological development shall be fully restored.

Ky. Rev. Stat. Ann., sec. 311.720(5), (6) (abortion regulations) (defining "fetus" as "a human being from fertilization until birth" and "human being" as "any member of the species homo sapiens from fertilization until death")

Kentucky Constitutional Convention Call (H.R. Res. 7, 1978 Gen. Assembly, Reg. Sess., 1978 Ky. Acts 1401):

> [R]equest[s] Congress . . . to call a convention for the sole purpose of proposing the following article as an amendment to the Constitution . . . :
>
> Section 1. With respect to the right to life, the word person as used in this article and in the Fifth and Fourteenth Articles of Amendment to this Constitution applies to all human beings irrespective of age, health, function, or condition of dependency,

including their unborn offspring at every stage of their biological development.

Section 2. No unborn person shall be deprived of life by any person, provided, however, that nothing in this article shall prohibit a law permitting only those medical procedures required to prevent the death of the mother.

Section 3. The Congress and the several states shall have the power to enforce this article by appropriate legislation.

Louisiana:

La. Stat. Ann., sec. 14.2(7) (West 1986) (defining "person" for purposes of criminal code to include "a human being from the moment of fertilization and implantation")

Danos v. St. Pierre, 383 So.2d 1019, 1027 (La. App.), aff'd, 402 So.2d 633 (La. 1991) (Lottinger, J., concurring):

> This definition [La. Stat. Ann., sec. 14.2(7) (West 1986)] added to the Criminal Code in 1976, reflects a legislative intent to classify an unborn child as a "person" for purposes of violent criminal conduct like homicide and battery. The definition reveals an express recognition by the legislature that life begins at the moment of conception and that this form of life can indeed be the victim of a harm, i.e., a murder or battery.

Sec. 1 of Acts 1991, No. 26 (amending state abortion law):

> It is declared to be the public policy of the state of Louisiana that it has a legitimate compelling interest in protecting, to the greatest extent possible, the life of the unborn from the time of conception until birth. We also affirm our belief that life begins at conception and that life thereafter is a continuum until the time of death.

Johnson v. Southern New Orleans Light and Traction Co., Docket 9048 (La. App. Orl. Dec. 10, 1923) (rejecting live birth and viability requirements in cause of action for wrongful death) (quoted with approval in Danos v. St. Pierre, 402 So.2d 633, 639 (La. 1981)):

> The argument of the defendant is that the infant before it is born is not a child, not a human being, that it is only a thing, a part of the anatomy of the mother, as are her organs. We cannot accept that theory. We believe that the infant is a child from the moment of conception, although life may be in a state of suspended animation, the subject of love, affection and hope and that the injury or killing of it in its mother's womb is covered by the [wrongful death statute] and gives its bereaved parents to a right of action against the guilty parties for their grief and mental anguish.

Accord: *Valence v. La. Power & Light Co.*, 50 So.2d 847 (La. App. 1951) (wrongful death of two to four month old unborn child).

Danos v. St. Pierre, 383 So.2d 1019, 1027 (La. App.), aff'd 402 So.2d 633 (La. 1991) (rejecting live birth requirement in action for wrongful death of a viable unborn child) (Lottinger, J., concurring):

> Viability has not been the controlling factor in some previous Louisiana cases allowing recovery [for wrongful death of a stillborn child], and there is no need to make it a controlling factor in this decision. Just as live birth is an arbitrary cut off point for wrongful death purposes, viability is equally arbitrary in deciding whether the fetus is a "person" whose wrongful killing is compensable.

Louisiana Constitutional Convention Call (Res. of July 16, 1976, S. Con Res. 70):

> Requests Congress to call a convention to propose

> a constitutional amendment extending the term "person" in the Fifth and Fourteenth amendments to apply to all human beings "irrespective of age, health, function or condition of dependency, including unborn offspring at every stage of their biological development;" permits states to adopt laws necessary to preserve the woman's life; requests state legislative bodies to apply to Congress to call a convention to propose this constitutional amendment; grants Congress and the states the power to enforce the amendment.

Maine:

Smith v. State, 33 Me. 48, 57 (1851) (construing criminal abortion statue which abolished the quickening distinction):

> There is a removal of the unsubstantial distinction, that it is no offense to procure an abortion, before the mother becomes sensible of the motion of the child, notwithstanding it is then capable of inheriting an estate; and immediately afterwards is a great misdemeanor. It is now equally criminal to produce abortion before and after quickening. And the unsuccessful attempt to cause the destruction of an unborn child is a crime, whether the child be quick or not.

Maryland:

Damasiewicz v. Gorsuch, 197 Md. 417, 438, 79 A.2d 550, 559 (1951) (recognizing cause of action for prenatal injuries) ("from a medical point of view, a child is alive within the mother before the time arrives when it can live apart from her"), id. at 440, 79 A.2d at 560 (theory that "an unborn child is a part of the mother" is "an outworn point of view, now rejected by modern medicine")

Group Health Ass'n v. Blumenthal, 295 Md. 104, 119, 453 A.2d 1198, 1207 (1983) ("a cause of action lies for the wrongful death of a child born alive who dies as a result of injuries sustained

while en ventre sa mere") (rejecting viability requirement)

Massachusetts:

Commonwealth v. Cass, 392, Mass. 799, 801, 467 N.E. 2d 1324, 1325 (1984) (viable fetus is a "person" within meaning of vehicular homicide statute):

> In keeping with approved usage, and giving terms their ordinary meaning, the word "person" is synonymous with the term "human being." An offspring of human parents cannot reasonably be considered to be other than a human being, and therefore a person, first within, and then in the normal course outside, the womb . . . By the use of the term[] "person" . . . the Legislature has given no hint of a contemplated distinction between pre-born and born human beings.

Torigan v. Watertown News Co., Inc., 352 Mass. 446, 449, 225 N.E.2d 926, 927 (1967) (rejecting viability requirement in wrongful death action where death follows live birth)

Massachusetts Constitutional Convention Call (Act of June 8, 1977, H.R. 5984):

> Requests Congress to call a convention to propose a constitutional amendment extending the term "person" in the Fifth and Fourteenth amendments to apply to all human beings "irrespective of age, health, function or condition of dependency, including unborn offspring at every stage of their biological development;" permits states to adopt laws necessary to preserve the woman's life; grants Congress and the states the power to enforce the amendment.

Michigan:

Womack v. Buchhorn, 384 Mich. 718, 725, 187 N.W.2d 218, xxx (1971) (recognizing cause of action for prenatal injuries

and rejecting viability requirement because "a child has a legal right to begin life with a sound mind and body")

O'Neil v. Morse, 385 Mich. 130, 188 N.W.2d 785 (1971) (recognizing cause of action for wrongful death of a viable stillborn child)

Minnesota:

Minn. Stat. Ann., secs. 609.266, 609.2661 through 609.2665, 609.267, 609.2671, 609.2672, 609.268 (1987 & 1992 Supp.) (amending criminal code to include a broad range of crimes, including homicide, that can be committed against an unborn child, regardless of gestational age)

Verkennes v. Corniea, 229 Minn. 365, 369, 38 N.W.2d 838, 840 (1940) (rejecting live birth requirement in wrongful death action) (quoting with approval federal district court opinion in *Bonbrest v. Kotz*, 65 F. Supp. 138, 140 (D. D.C. 1946), where court said "[f]rom the viewpoint of the civil law, and the law of property, a child en ventre sa mere is not only regarded as [a] human being, but as such from the moment of conception--which it is in fact")

Missouri:

Mo. Ann. Stat. sec. 1.205.1(1) (Vernon Supp. 1992) (preamble to Missouri Abortion Law) ("[t]he life of each human being begins at conception")

Mo. Ann. Stat., sec. 188.015(6) (Vernon Supp. 1992) (abortion regulations) (defining "unborn child" as "the offspring of human beings from the moment of conception until birth and at every stage of its biological development")

Rodgers v. Danforth, 486 S.W.2d 258, 259 (Mo. 1972) (construing criminal abortion law) (accepting stipulation that "unborn children have all the qualities and attributes of adult human persons differing only in age or maturity" and that "[m]edically, life is a continuum from conception to death")

Steggall v. Morris, 363 Mo. 1224, 1229-33, 258 S.W.2d 577, 579-81 (1953) (rejecting viability requirement in cause of action for prenatal injuries)

Missouri Constitutional Convention Call (Res. of Apr. 24, 1975, S. Con. Res. 7):

> Requests Congress to call a convention to propose a constitutional amendment extending the term "person" in the Fifth and Fourteenth amendments to apply to all human beings "irrespective of age, health, function, or condition of dependency, including unborn offspring at every stage of their biological development;" permits states to adopt laws necessary to preserve the woman's life; grants Congress and the states the power to enforce the amendment.

Montana:

Mont. Code Ann., sec. 50-20-102 (1991) (statement of legislative purpose and intent--abortion regulations):

> The legislature reaffirms the tradition of the state of Montana to protect every human life, whether unborn or aged, healthy or sick. In keeping with this tradition and in the spirit of our constitution, we reaffirm the intent to extent the protection of the laws of Montana in favor of all human life.

Mont. Code Ann., sec. 41-1-103 (1991) ("[a] child conceived but not yet born is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth")

Nebraska:

Neb. Rev. Stat. sec. 28-325 (1989) (legislative findings in statutes regulating abortion) (legislators "deplore the destruction of the unborn human lives which has and will occur . . . as a consequence of the United States Supreme Court's decision," and lament their inability "to protect the life, health, and welfare of

pregnant women and unborn human life")

Hans v. State, 147 Neb. 67, 72, 22 N.W.2d 385, 389 on rehearing, 147 Neb. 73, 25 N.W.2d 35 (1946) (statute defining offense of "foeticide" meant "the unlawful destruction of an unborn child, in ventre sa mere, at any stage of gestation")

Nebraska Constitutional Convention Call (Res. of Apr. 21, 1978, Legis. Res. 152):

> Legislature . . . petition[s] . . . Congress . . . to call a convention for the sole purpose of proposing the following article as an amendment to the Constitution of the United States . . .
>
> ARTICLE
>
> Section 1. With respect to the right to life, the word person as used in this article and in the Fifth and Fourteenth Articles of Amendment to this Constitution applies to all human beings irrespective of age, health, function, or condition of dependency, including their unborn offspring at every stage of their biological development.
>
> Section 2. No unborn child shall be deprived of life by any person, provided, however, that nothing in this article shall prohibit a law permitting only those medical procedures required to prevent the death of the mother.
>
> Section 3. The Congress and the several states shall have the power to enforce this article by appropriate legislation.

Nevada:

White v. Yup, 85 Nev. 527, 536-37, 458 P.2d 617, 623 (1969) (recognizing cause of action for prenatal injuries and for the wrongful death of a viable, stillborn child) (proposition that "[a]n unborn child is a part of its mother until birth and thus has no juridical existence" "has no scientific or medical basis in fact")

Nevada Constitutional Convention Call (S.J. Res. 27, 60th Legis., 1979 Nev. Stat. 2014):

> [L]egislature requests . . . Congress . . . to call a convention limited to proposing an amendment to the Constitution . . . to protect human life by restricting abortion [subject to exceptions in cases where the pregnancy results from rape or incest and where continuation of the pregnancy would seriously endanger the life of the mother].

New Hampshire:

Bennett v. Hymers, 101 N.H. 483, 485, 147 A.2d 108, 110 (1958) (rejecting viability requirement in cause of action for prenatal injuries) ("[w]e adopt the opinion that the fetus from the time of conception become a separate organism and remains so throughout its life")

Wallace v. Wallace, 120 N.H. 675, 679, 421 A.2d 134, 136 (1980) (wrongful death action) ("[t]o deny a nonviable fetus a [wrongful death] cause of action is not to deny that life begins with conception")

N.H. Rev. Stat. Ann., secs. 631:1, 631:2 (1991 Supp.) (amending criminal assault statutes to include physical injuries to pregnant woman resulting in miscarriage or stillbirth)

New Jersey:

Smith v. Brennan, 31 N.J. 353, 362, 157 A.2d 497, 502 (1960) (rejecting viability requirement in cause of action for prenatal injuries) ("[m]edical authorities have long recognized that

a child is in existence from the moment of conception, and not merely a part of its mother's body"):

> We see no reason for denying recovery for a prenatal injury because it occurred before the infant was capable of independent existence. In the first place, age is not the sole measure of determining in a borderline case whether or not a fetus was viable at the time of the injury, unless it was immediately born. Therefore, the viability rule is impossible of practical application . . . In addition, . . . medical authority recognizes that an unborn child is a distinct biological entity from the time of conception, and many branches of the law afford the unborn child protection throughout the period of gestation. The most important consideration, however, is that the viability distinction has no relevance to the injustice of denying recovery for harm which can be proved to have resulted from the wrongful act of another. Whether viable or not at the time of injury, the child sustains the same harm after birth, and therefore, should be given the same opportunity for redress.

Id. at 367, 157 A.2d at 504.

In *Smith v. Brennan*, the New Jersey Supreme Court quoted with approval Chief Justice Brogan's dissent in *Stemmer v. Kline*, 128 N.J.L. 455, 466, 26 A.2d 489, 687 (1942):

> While it is a fact that there is a close dependence by the unborn child on the organism of the mother, it is not disputed to-day that the mother and the child are two separate and distinct entities; that the unborn child has its own system of circulation of the blood separate and apart from the mother; that there is no communication between the two circulation systems; that the heart beat of the child is not in tune with that of the mother but is more rapid; that there is no dependence by the child on the mother except for sustenance. It might be

> remarked here that even after birth the child depends for sustenance upon the mother or upon a third party. It is not the fact that an unborn child is part of the mother, but that rather in the unborn state it lived with the mother, we might say, and from conception on developed its own distinct, separate personality.

Giardina v. Bennett, 111 N.J. 412, 545 A.2d 139 (1988) (granting to parents a common law cause of action where a physician negligently causes the pre-birth death of an infant)

State v. Gedicke, 43 N.J.L. 86, 89-90 (1881) (interpreting state abortion law) (state abortion law amended "to protect the life of the child also, and inflict the same punishment, in case of its death, as if the mother should die")

New Jersey Constitutional Convention Call (Act of Apr. 21, 1977, S. 1271):

> Requests Congress to call a convention to propose a constitutional amendment which would provide that every human being subject to the jurisdiction of the United States or any state shall be deemed from the moment of fertilization to be a person and entitled to the right to life; provides that Congress and the states shall have concurrent powers to enforce such an amendment.

New York:

Kelly v. Gregory, 282 A.D. 542, 543-44, 125 N.Y.S.2d 696, 697 (1953) (rejecting viability requirement in cause of action for prenatal injuries) ("legal separability should begin where there is biological separability" and "separability begins at conception"):

> The mother's biological contribution from conception on is nourishment and protection; but the foetus has become a separate organism and remains so throughout its life. That it may not live if its protection and nourishment are cut off earlier than

> the viable stage of its development is not to destroy its separability; it is rather to describe conditions under which life will not continue. Succeeding conditions, exist, of course, that have that result at every stage of its life, post-natal as well as pre-natal.

Id. at 544, 125 N.Y.S.2d at 697.

North Carolina:

DiDonato v. Wortman, 320 N.C. 423, 435, 358 S.E.2d 489, 496 (1987) (recognizing cause of action for wrongful death of a viable unborn child) ("[t]he public policy of this state as expressed by the legislature in our statutes recognizes that an unborn child is a person") (Martin, J., concurring in part and dissenting in part)

Corkey v. Edwards, 322 F. Supp. 1248, 1252 (W.D.N.C. 1971), vacated and remanded (construing criminal abortion statute):

> Apart, the sperm and the unfertilized egg will die; neither has the capacity to grow and develop independently as does the fertilized egg. During fertilization, sperm and egg pool their nucleii and chromosomes. Biologically, a living organism belonging to the species homo sapiens is created out of this organization. Genetically, the adult man was from such a beginning all that he essentially has become in every cell and human attribute.

North Dakota:

N.D. Cen. Code, secs. 12.7-17.1-02 through 12.1-17.1-06 (Supp. 1991) (amending criminal code to define broad range of crimes, including homicide, that can be committed against unborn child, regardless of gestational age)

Hopkins v. McBane, 359 N.W.2d 862, 865 (rejecting viability requirement in cause of action for prenatal injuries and live

birth requirement in wrongful death actions) ("it is commonly understood that an unborn child is a human being or person which has life and which, even prior to the process of birth, can experience death")

statute providing that "[a] child conceived but not born is to be deemed an existing person so far as may be necessary for its interests in the event of its subsequent birth" was intended "to ensure and to protect the interests of a child subsequent to its conception but prior to its birth"), id. 359 N.W. 2d at 864

Ohio:

Steinberg v. Brown, 321 F. Supp. 741, 746 (N.D. Ohio 1970) (construing criminal abortion law) (holding that human life is entitled to federal constitutional protection from conception) ("a new life comes into being with the union of human egg and sperm cells" and "such terms as 'quick' or 'viable', which are frequently encountered in legal discussion, are scientifically imprecise and without recognized meaning")

Williams v. Marion Rapid Transmit, 152 Ohio St. 114, 128-29, 39 Ohio Ops. 433, 439-40, 87 N.E.2d 334, 340 (1949) (recognizing cause of action for prenatal injuries):

> To hold that the plaintiff in this case [a viable unborn child] did not suffer an injury in her person would require this court to announce that as a matter of law the infant is part of the mother until birth and has no existence in law until that time. In our view such a ruling would deprive the infant of the right [to a remedy] conferred by the [Ohio] Constitution upon all persons, by the application of a time worn fiction not founded on fact and within common knowledge untrue and unjustified.

The court also quoted with approval Prosser on Torts (3d ed.) wherein Professor Prosser stated, "So far as duty is concerned, if existence at the time [of injury] is necessary, medical authority has recognized long since that the child is in existence from the moment of conception, and that for many purposes its

existence is recognized by the law." Id. at 127, 39 Ohio Ops. at 439, 87 N.E.2d at 339.

Oklahoma:

Okla. Stat. Ann., tit. 63, sec. 1-730(2) (1984) (abortion regulations) (defining "unborn child" as "the unborn offspring of human beings from the moment of conception, through pregnancy, and until live birth . . . ")

Evans v. Olson, 550 P.2d 924, 925 (1976) (rejecting viability requirement in cause of action for prenatal injuries and live birth requirement in wrongful death actions) ("there is no medical or scientific basis" for the proposition that "[a]n unborn child has no juridical existence apart from its mother")

Oregon:

State v. Ausplun, 86 Or. 121, 131-132, 167 P. 1019, 1022-23 (1917) (construing criminal abortion law):

> The statute refers to "any woman pregnant with a child" without reference to the stage of pregnancy. When a virile spermatozoon unites with a fertile ovum in the uterus, conception is accomplished. Pregnancy at once ensues, and under normal circumstances continues until parturition. During all this time the woman is "pregnant with a child" within the meaning of the statute. She cannot be pregnant with anything else than a child. From the moment of conception a new life has begun, and is protected by the enactment. The product of conception during its entire course is imbued with life, and is capable of being destroyed as contemplated by the law. By such destruction the death of a child is produced and often that of its mother as well.

Mallison v. Pomeroy, 205 Or. 690, 696-97, 291 P.2d 225, 228 (1955) (recognizing cause of action for prenatal injuries) ("[i]n Oregon we have recognized by statute the separate entity of an

unborn child by protecting him in his property rights and against criminal conduct, and we can see no logical reason why a viable child should not be protected for injuries sustained through the tortious acts of another")

Libbee v. Permanente Clinic, 268 Or. 258, 518 P.2d 636, 520 P.2d 361 (1974) (recognizing cause of action for the wrongful death of a viable stillborn child)

Pennsylvania:

Pa. Cons. Stat. Ann., tit. 18, sec. 3203 (Purdon's 1992 Supp.) (abortion regulations) (defining "unborn child" and "fetus" as "an individual organism of the species homo sapiens from fertilization until live birth")

Amadio v. Levin, 509 Pa. 199, 204, 501 A.2d 1085, 1087 (1985) (rejecting both viability and live birth requirements in wrongful death actions) ("a child en ventre sa mere is a separate individual from the moment of conception")

Sinkler v. Kneale, 401 Pa. 267, 273, 164 A.2d 93, 96 (1960) (rejecting viability requirement in cause of action for prenatal injuries) (viability "has little to do with the basis right to recover, when the foetus is regarded as having existence as a separate creature form the moment of conception")

Pennsylvania Constitutional Convention Call (H.R. 71, 1978 Gen. Assembly, 1978 Pa. Laws 1431):

> [A]pplication to the Congress . . . to call a convention for drafting and proposing an amendment to the Constitution . . . to guarantee the right to life to the unborn fetus by doing the following:
>
> (a) With respect to the right to life guaranteed in the United States Constitution, provide that every human being subject o the jurisdiction of the United States or any state shall be deemed from the moment of fertilization to be a

person and entitled to the right to life.

(b) Provide that Congress and the several states shall have concurrent powers to enforce such an amendment by appropriate legislation.

* * *

(d) Nothing in this article shall prohibit a law permitting only those medical procedures required to prevent the death of the mother.

Rhode Island:

R.I. Gen. Laws, sec. 11-3-4 (1981) (1973 R.I. Pub. Laws 68-70, ch. 15, sec. 2) (criminal abortion statute):

> It shall be conclusively presumed in any action concerning the construction, application or validity or sec. 11-3-1 [prohibiting abortion] that human life commences at the instant of conception and that said human life at said instant of conception is a person within the language and meaning of the fourteenth amendment of the Constitution . . .

Sylvia v. Gobeille, 101 R.I. 76, 79, 220 A.2d 222, 223-24 (1966) (rejecting viability requirement in cause of action for prenatal injuries) (noting "the medical fact that a fetus becomes a living human being from the moment of conception" and rejecting viability as a "decisive criterion" because "there is no sound reason for drawing a line at the precise moment of the fetal development when the child attains the capability of an independent existence")

Presley v. Newport Hospital, 117 R.I. 177, 183, 365 A.2d 748, 751 (1976) (rejecting live birth requirement in wrongful death of a viable unborn child) (citing with approval the civil law proposition that "from the moment of conception a separate organism comes into existence" and the medical proposition that "an ovum, once it is fertilized, is a separate living entity"):

> [V]iability is a concept bearing no relation to the attempts of the law to provide remedies for civil wrongs. If we profess allegiance to reason, it would be seditious to adopt so arbitrary and uncertain a concept as viability as a dividing line between those persons who shall enjoy the protection of our remedial laws and those who shall become, for most intents and purposes, nonentities. If it seems that if live birth is to be characterized, as is so frequently has been, as an arbitrary line of demarcation, then viability, when enlisted to serve that same purpose, is a veritable non sequitur.

Id. at 188, 365 A.2d at 753-54 (dicta in plurality opinion).

Rhode Island Constitutional Convention Call (Act of Apr. 21, 1977, H.R. 5150):

> Requests Congress to call a convention to propose a constitutional amendment which would provide that every human being subject to the jurisdiction of the United States or any state shall be deemed from the moment of fertilization to be a person and entitled to the right to life; provides that Congress and the states shall have concurrent power to enforce such an amendment.

South Dakota:

State v. Munson, 86 S.D. 663, 669, 201 N.W.2d 123, 126 (1972), vacated and remanded, 410 U.S. 950 (1973) (construing criminal abortion law) (citing with approval holding in *Steinberg v. Brown*, 321 F. Supp. 7431 (D. Ohio 1970), that human life is entitled to federal constitutional protection from conception)

S.D. Codified Laws Ann., sec. 21-5-1 (1987) (amending wrongful death statute to include "an unborn child" without regard to gestational age)

S.D. Codified Laws Ann., sec. 22-17-6 (1988) ("[a]ny person who intentionally kills a human fetus by causing an injury

to its mother is guilty of a Class 4 felony")

S.D. Codified Laws Ann., sec. 26-1-2 (1992) ("[a] child conceived, but not born, is to be deemed an existing person so far as may be necessary for its interests in the event of its subsequent birth")

Texas:

Thompson v. State, 493 S.W.2d 913, 918 (Tex. Crim. App. 1971) vacated and remanded, 410 U.S. 950 (1973) (construing criminal abortion law):

> The State of Texas is committed to preserving the lives of its citizens so that no citizen "shall be deprived of life . . . except by the due course of the law of the land." [Citation omitted]. [The Texas abortion law] is designed to protect fetal life . . . and this justifies prohibiting termination of the life of the fetus or embryo except for the purpose of saving the life of the mother.

Leal v. C.C. Pitts Sand and Gravel, Inc., 419 S.W.2d 820, 822 (Tex. 1967) (recognizing cause of action for wrongful death for prenatal injuries where death occurs after live birth), rev'g 413 S.W.2d 825 (Tex. Civ. App. 1967) (denying cause of action) and app'g dissenting opinion of Justice Cadena, 413 S.W. 2d at 828 ("medical science . . . consider[s] that life begins at conception"), id. at 829 ("legalistic concept that the unborn child is but a part of its mother" is "contrary to scientific fact and comon sense")

Witty v. Am. Gen. Capital Dist., Inc., 727 S.W.2d 503, 505 (Tex. 1987) (denying cause of action for wrongful death of viable child who was stillborn but recognizing "the fetus as having an existence separate from its mother")

Yandell v. Delgago, 468 S.W.2d 475 (Tex. Civ. App. 1971) (rejecting viability requirement in cause of action for prenatal injuries), writ ref'd n.r.e. per curiam, 471 S.W.2d 569 (Tex. 1971)

Utah:

Utah Code Ann., sec. 76-7-301.1(1) (1992) (preamble to Utah abortion law):

> It is the finding and policy of the Legislature, reflecting and reasserting the provisions of Article I, Section 1 and 7, Utah Constitution, which recognize that life founded on inherent and inalienable rights is entitled to protection of law and due process; and that unborn children have inherent and inalienable rights that are entitled to protection by the state of Utah pursuant to the provisions of the Utah Constitution.

Sec. 76-7-301.1(2):

> The state of Utah has a compelling interest in the protection of the lives of its unborn children.

Sec. 76070301.1(3):

> It is the intent of the Legislature to protect and guarantee to unborn children their inherent and inalienable right to life as required by Article I, Sections 1 and 7, Utah Constitution.

Utah Code Ann., sec. 76-5-201(1) (1992 Supp.) (defining offense of criminal homicide as causing "the death of another human being, including an unborn child")

Utah Constitutional Convention Call (H.R.J. Res. 28, 42nd Legis., Reg. Sess., 1977 utah Laws 1317, 1318):

> Requests Congress to call a convention for the purpose of drafting and submitting for ratification by the states, an amendment to the Constitution that will guarantee to every human life, from the moment of fertilization throughout its natural existence, in every state, territory, and possession of the United States, the full protection of all laws respecting life,

> expecting an unborn child whose mother's life would otherwise be lost.

Virginia:

Kalafult v. Gruver, 239 Va. 278, 283-84, 389 S.E.2d 681, 683-84 (1990) (rejecting viability rule in cause of action for prenatal injuries or for wrongful death following live birth) (noting "developments in medical science, especially in the field of embryology," court held that "an action may be maintained for recovery of damages for any injury occurring after conception, provided the tortious conduct and the proximate cause of the harm can be established")

Wisconsin:

Wis. Stat. Ann., sec, 940.04(6) (West 1982) (criminal abortion statute defining "unborn child" as "a human being from the time of conception until it is born alive")

Puhl v. Milwaukee Auto Ins. Co., 8 Wis.2d 343, 356, 99 N.W.2d 163, 170 (1959) (rejecting viability requirement in cause of action for prenatal injuries):

> The viability theory has been challenged as unrealistic in that it draws an arbitrary line between viability and non-viability and fails to recognize the biological fact that there is a living human being before viability. A child is no more a part of its mother before it becomes viable than it is after viability. It would be more accurate to say that the fetus from conception lives within its mother rather than as a part of her. The claim of a child injured before viability is just as meritorious as that of a child injured during the viable stage.

Kwaterski v. State Farm Mut. Auto Ins. Co., 34 Wis.2d 14, 21, 148 N.W.2d 107, 111 (1966) (rejecting born alive requirement in wrongful death actions) (assertion that "[a] child has not juridical existence apart from its mother" has "no scientific or medical basis in fact")

APPENDIX D

18th Century British Common Law Which Considered The Child as a Person Before Birth

The 18th Century British Common Law, both the courts of law and of equity, held the child *en ventre sa mere* to be a person. A review of the case law demonstrates that in 18th Century Britain: (a) the courts reasoned from the fact that such child is a person, as it is *en ventre sa mere*, to the application of law and equity to that child; (b) the Equity courts, in this instance, learnt their equity (i.e. what was natural justice) as much from principles of law as from its own rulings; (c) courts sitting in civil cases learnt from the principles of criminal law recognizing the child before birth; and (d) the live birth of the child served to provide proof of what was the case during his or gestation - i.e. that the child was a person in existence at the relevant time during gestation, the gender of the child if pertinent, and that the child was indeed alive in utero at the time when the injuries, observable at birth and of what the child then died, were inflicted by the accused charged with the child's murder.

In *Beale v. Beale*, (1713) 1 P. Wms. 244 (24 ER 373) (England), Harcourt LC reasoned from the regard for the child *en*

ventre sa mere at law (i.e. before the courts of law as distinct to equity) to what a court of equity should do:

> As to the other objection, it would be very hard in a court of equity, that a child, because it happened not to be born at such a time, must, therefore, be unprovided for, but as the law in many respects, regards an infant in *ventre sa mere*, so as to allow such child to be vouched (1 Inst. 390); also as the mother may be guilty of the murder of the child in *ventre sa mere*, if she takes poison with an intent to poison it, and the child is born alive, and afterwards dies of that poison (3 Inst. 50, 51): so there is more reason that equity should consider such child, in order to its being *provided for*; and therefore this posthumous child may be well looked upon, in equity, to be *living at her father's death* in *ventre sa mere*. (at 246, underling added)

In *Burdet v. Hopegood*, 1718 1 P. Wms. 486 (24 ER 484) (England), where a testator died leaving his wife *ensient* with a son, the plaintiff Sir Robert Burdet, it was nevertheless objected that "the testator had died leaving a son at the time of his death". The report records:

> Hereupon Lord Chancellor *Parker* referred [the question] to the judges of the King's Bench, who were unanimously of opinion, that the plaintiff Sir *Robert* though not born, had yet an existence in the eye of the law, as in *ventre sa mere*, which in many respects was regarded: as if a woman takes poison to kill her child then in her womb, and the child is born alive, and afterwards dies of that poison, the woman is guilty of murder (vide *Beale v. Beale*, ante, 244); also a child in *ventre sa mere* may be vouched, and may be a devisee, and it would be

> hard to disinherit such an only child, nor could it be imagined the testator ever intended to so to do. (underlining added)

With this the Lord Chancellor agreed, and gave judgment for the plaintiff. To meet the objection, the judges of the King's Bench reasoned from the fact that the plaintiff was in existence when a child *en ventre sa mere*, as recognised by the courts of law, of which they gave a number of instances, notably, the criminal law: they concluded that the testator's intention embraced this son in existence at his death. It was only the *proof* of this which was briefly delayed. No fiction or straining of language was involved in arriving at the result.

In *Thellusson v. Woodford* (1805) 11 Ves. Jun. 112 (32 ER 1030) (England), the House of Lords was asked on appeal to determine the following objection, as to why the testator's Will was said to infringe the rule against perpetuities:

> The second objection, which has been made in this case is, that the testator has added to the lives of persons in being at the time of his decease those of persons not then born. (at 138; 1040)

This related to twin grandsons of the testator *en ventre* at his death: they were defendants in the action (4 Ves. 237; ER 122) (England). It was to their detriment if they were held to be

persons in being at the testator's death, because if they were not they could eventually be entitled to the accumulated property, applying the doctrine of *Cy pres* (as noted in argument, 4 Ves. 298; ER 152) (England).

Lord Chief Baron Macdonald, delivering the unanimous opinion of the Judges, first held that by the words "born in due time afterwards" the testator was referring to the period of gestation, and mean, "...such children of the several persons named as their respective mothers were *ensient* with at the time of his death" (at 138-139; 1041). Then, in dismissing this as a ground of objection to the Will, he applied a number of cases recognizing the existence of the child *en ventre sa mere* (at 139; 1041): in particular, the *Beale* and *Burdet* cases noted above, and also the following cases recognising that the child *en ventre sa mere* is a person in reality, to all intents and purposes - -

> In *Wallis v. Hodgson* [sic] (2 Atk. 117) (England) Lord Hardwicke held, that a posthumous child was entitled under the Statute of Distributions; and his reason deserves notice. 'The principal reason (says he) that I go upon, is, that the Plaintiff was *en ventre sa mere* at the time of her brother's death, and consequently a person *in rerum nutura* [sic, *natura*]; so that by the rules of the Common and Civil Law she was, to all intents and purposes, a child, as much as if born in the father's lifetime," ...In *Doe v. Lancashire* (5 Term Rep. 49) (England),

> the Court of King's Bench has held, that marriage and the birth of a posthumous child revoke a Will, in like manner as if the child had been born in the life-time of the father. In *Doe v. Clarke* (2 H. Black. 399) (England) Lord Chief Justice Eyre holds, that independent of intention an infant *en ventre sa mere* by the course and order of nature is then living; and comes clearly within the description of a child living at the parent's decease; and he professes not to accede to the distinction between the cases, in which a provision has been made for children generally, and where the testator has been supposed to mark a personal affection for children, who happen to be actually born at the time of his death. The most recent case is that of *Long v. Blackall* (3 Ves. 486; 7 Term Rep. 100) (England). There the Court of King's Bench had no doubt, that a devise to a child *en ventre sa mere* in the first instance was good, and a limitation over was good also, ... (at 139-141; 1041, underlining added).

Because the child *en ventre sa mere* is a person in being, Lord Chief Baron Macdonald held that such child was a life that could postpone vesting (at 141; 1042), and that at the time of the vesting of the estate at the end of the period of accumulation, a child *en ventre sa mere* is entitled to take (142ff; 1042).

Lord Hardwicke supported his ruling in *Wallis v. Hodson* (1740) 2 Atk. 114 (26 ER 472) (England), noted above, by listing principles of the Common Law showing regard for children *en ventre sa mere* as persons in divers instances:

> First, as to the common law, there is the trite case of an infant *en ventre sa mere* being vouched in a

> common recovery; a mother also may justify the detaining of charters on behalf of it; a devise to him is good, by the opinion of *Treby* and *Powell*, in *Scatterwood* and *Edge*, 1 *Salk*. 229, a bill may be brought in his behalf, and this court will grant an injunction in his favor to stay waste, 2 *Vern*. 710, *Musgrave versus Parry*, et al. (at 117; 473)

At first instance in *Thellusson v. Woodford* (1798) 4 Ves. Jun. 227 (31 ER 117) (England), it is similarly objected: "That a devise for the life of a child *en ventre sa mere* is void" (at 320; 162). In answer to this, Buller J applied the same passage from Lord *Hardwicke* in *Wallis v. Hodson* on which the House of Lords also relied, and then continued:

> In the same case [*Wallis v. Hodson*] Lord *Hardwicke* takes notice, that the Civil Law confines the rule to cases, where it is for the benefit of the child to be considered as born: but notwithstanding he states the rule to be, that such is to be considered living to all intents and purposes.
>
> ...
>
> ... In *Doe v. Clarke*, the words 'that wherever such consideration would be for his benefit, a child *en ventre* sa mere shall be considered as absolutely born' were used by me, because I found them in the Book, from whence the passage was taken. But there is no reason for so confining the rule. Why should not children *en ventre sa mere* be considered generally as in existence? They are entitled to all the privileges of other persons. In this case it is enough to say, such a child is capable of having an estate given to him, and consequently to another person for his life. The infant is not hurt, nor is the

> Law transgressed, by giving the interest to a third person any more than by giving it to the infant himself.
>
> ...
>
> *Goodtitle v. Wood* (7 Term Rep. B.R. 103, note) (England) is an authority to the same point. The effect is, that there is no difference between a child actually born and a child *en ventre sa mere*. In *Lancashire v. Lancashire* Judge Grose says, 'I know of no argument founded on law and natural justice, in favor of the child, who is born during his father's life, that does not equally extend to a posthumous child, ... " (at 322-324; 163-164, underling added)

Her Majesty's Attorney-General, a respondent, was of like mind: he submitted to the House of Lords, "The whole foundation for the argument, that such children are to be considered as in being for their own benefit only, rests upon some words which some Reporters of Decisions have ascribed to Judges, when delivering their opinions upon claims made by such children. But these words, if they were used in those cases, by no means negative the proposition, that such children are in being for all purposes. There is no reason for confining the rule. They are entitled to the privileges of all persons; and it is reasonable, that they should be the means of conferring privileges upon other persons. But the law considers such children as being in cases, in which they may be prejudiced. They may be vouched in a

recovery (Co. Lit. 390a); though such voucher is for the purpose of making them answerable over in value. They may be executors." (11 Ves. Jun. 112, 129-130; 1037).

In the result, determining the case "according to the rules of Law and Equity", Lord Eldon (HL) affirmed the judgment at first instance. (150-151; 1045).

That Chancery and the King's Bench were *ad idem* that an infant *en ventre sa mere* was a life in being, as apparent from the references in the case to the history of *Long v. Blackall* before those two Courts. (4 Ves. 227, 341-343; 11 Ves. 112, 150) That the Court of Common Pleas was of the same mind, appears from the ruling of Eyre LCJ in *Doe v. Clarke* (1795) 2 H.Bl. 399 (126 ER 617) (England) noted by the House of Lords (see quotation above).

The reasoning in the several quotations set out above grounded the property rights of a child *en ventre sa mere* in his reality as a person in being. Even more so should the child's existence justify his or her life being protected by others, before and after birth, giving rise to a defence in a criminal case. In fact, as *Beale v. Beale* (1713) and *Burdet v. Hopegood* (1718) show, it was apparent to the court from the criminal law that the child *en* ventre sa mere is a living person. It is equally apparent, too, from

the fact that such child has a right not to be injured, for there is a duty of care to him or her: *Watt v. Rams* [1972] VR 353 (England); *Lynch v. Lynch* [1991] Aust Tors Reports ¶81-117 (SCt), affirmed (1991) 25 NSWLR 411 (CA) (England). Intentionally injury would be a trespass. [If the child cannot sue until birth, that appears to be a procedural bar: *Watt*, 376 lines 1-6; *Lynch* (SCt), page 69,096 (2nd para.)]

The rule in *Burdet v. Hopegood* and other cases said Loughborough LC in *Thellusson v. Woodford* (1798) 4 Ves. Jun. 227-342 (England), "is according to every principle of justice and natural feeling." These same principles equally justify the application of the justification of defence of others in respect to infants *en ventre sa mere*.

Two later House of Lords cases do not affect the result in *Thellusson* or its reasoning from the substantive fact that the child *ensient* is a person in being, nor the substantive principles of law or equity relating to the child *en ventre sa mere* cited in that case:

(1) *Villar v. Gilbey* [1907] AC 139 (HL) (England) re-asserted as a rule of construction that the word "born" is construed to include an unborn child only where that construction is necessary for its benefit. Counsel for the appellant expressly

noted, "It is necessary to distinguish between cases of construction proper and cases in which a principle of law is involved." (at 139-140) Lord Loreburn LC noted (at 144) some of the principles of substantive law relating to the child *en ventre sa mere*, such as the law's solicitude for the child and that it can be a party to proceedings (which Lord Hardwicke noted in *Wallis v. Hodson*), before he turned to the matter of construction in that case. At 149, Lord Atkinson briefly distinguished *Thellusson* as relating to the rule against perpetuities, but did not disturb its substantive reasoning or the result.

(2) *Elliot v. Lord Joicy* [1935] AC 209 HL (England) also involved a question of construction relating to a posthumous child (he was held not to come within the intention of the testatrix as appearing from her Will). *Thellusson* was again distinguished as relating to perpetuity only and having "nothing to do with any question of construction analogous to the question now in issue" (at 220 middle); a dictum of Lord Eldon relating to construction was qualified in its effect so that the rule of construction for the benefit of posthumous child did not apply where the benefit were only of an indirect kind (at 228-229, read with 220-221). Lord MacMillan, after noting that English and Scots law on the question

of interpretation where a posthumous child is concerned was the same (at 236-237), accepted the following learned statement of Scots law as accurate:

> the doctrine of the Civil Law which has long been received into our system of jurisprudence, that a child born after the period at which the vesting of a right falls to be determined, but proved by the period to its birth to have been in utero at that time, is entitled to the rights of an existing period from the period of its conception. ... (239, underlining added)

In other words birth serves, not to change the child's status from non-entity to person, but as *proof* of the child's existence in utero, with the entitlement to "the rights of an existing person from the period of its conception." CF. In re *Wilmer's Trusts* [1903] 1 Ch. 874, 880-883; [1903] 2 Ch. 411 (CA), 417-421, (England) where what became known at birth was "related back" as proof of that being the fact also during gestation: the child *ensient* at the testatrix's death turned out to be a son when born - "here we must treat it as the actual fact that there was a third son in existence prior to the death of the testatrix" (at 421, CA). He was thus a relevant life for the rule against perpetuities - in *Thellusson* the gender of the twins *ensient* at the testator's death was immaterial.

In *Thellusson*, the court reasoned from the fact that the child *ensient* is a person in existence to establish that the principles of law relating to perpetuities were not offended by holding such child to be a life in being at the testator's death. Because *Thellusson* involved a principle of law, it went further than the rule of construction involved in the *Villar* and *Elliot* cases: its recognition of the child during gestation was "to all intents and purposes", in fact it was to the prejudice of the twins in that case. [Likewise, *In re Wilmer's Trusts* [1903] 2 Ch. 411 (CA) (England), 421, per Romer LJ] That there are other principles of law which also apply to a child *ensient* for his or her benefit or prejudice, indeed, rights or liabilities, was noted in the quotations from *Thellusson* and the earlier cases given above.

In a recent Scotish case, *McWilliams v. Lord Fraser of Carmyllie* (28 July 1992) (England), Lord Morton of Shuna refused to apply *Elliot v. Lord Joicey* to a negligence claim where the parents were suing for damages for the death of their child who was injured in utero then born alive and died.

The defender had conceded that during the period Martin was alive there was, assuming fault, a liability to pay damages to Martin for his pre-natal injuries, but this concession was limited to

the child's right of action being dependent on the legal fiction that, "in all matters affecting its interests, the unborn child in utero should be deemed to be already born", described by Lord MacMillan in *Elliot v Joicey* (at 238). The defender limited his concession to that fiction because, in applying this rule of construction in that case, Lord MacMillan said that "According to the law of Scotland, a child in utero is fictionally deemed to be already born only when the result of applying the fiction is to benefit the child when actually born, and that the fiction cannot be invoked in the interests of any third party." The defender argued that, for this reason, the parents as third parties had no claim. (pp. 3-4)

Lord Morton rejected this reliance on *Elliot* because he accepted the view of the Scottish Law Commission that there was a duty of care to a child in the womb (p.6), and that a child born alive with injuries could recover under the principles of negligence (pp.6-10): he held that this is "the law of Scotland both before and after the passage of the Damages (Scotland) Act" (p.10). Returning to the legal fiction referred to by Lord McMillan in *Elliot v. Joicey*, he considered some case law and concluded:

For these reasons I consider that it is not necessary

> to rely on the 'legal fiction' to give a child who is born alive a title to sue for injuries sustained in utero and that if a child dies after being born alive and the death is cause by injuries sustained in utero the parents of that child have a title to sue for damages for the death of that child. I shall accordingly repel the defender's plea to the relevancy [of the claim]. - (p.13)

Lord Morton was right in principle to refuse to allow the rule of construction in *Elliot* to excuse a defendant where liability turned, not on any legal fiction, but on substantive issues such as the duty of care towards another.

VV.

QUOTATIONS CONCERNING THE CLASS OF HUMAN BEINGS WHO POSSESS NATURAL AND INALIENABLE RIGHTS TO LIFE

1. In a speech reflecting upon the Fred Scott decision in Springfield, Illinois on June 26, 1857, Abraham Lincoln, in criticizing Chief Justice Roger Taney's acknowledgement that the Declaration of Independence was broad enough to include "the whole human family," but failed to implement the principles therein encompassed, explained the principle J.M. exposes:

"They (the founding fathers) meant simply to declare the right (to life, liberty and happiness) so that the enforcement of it might follow as fast as circumstances should permit. They meant to set up a standard for free society, which should be familiar to all, and revered by all, constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and the happiness and value of life to all people of all colors everywhere. The assertion that 'all mean are created equal...' was placed in the Declaration, not for [separation from Britain], but for future use." Lincoln on Democracy, "A Standard Maximum for Free Society," (June 16, 1857), p. 90, 91

2. Compare what Lincoln says here about slavery to the "present controversy":

"All these free blacks are the descendants of slaves, or have been slaves themselves, and they would be slaves now, but for something which has operated on their white owners, inducing them, at vast pecuniary sacrifices, to liberate them. What is this something? Is there any mistaking it? In all these cases it is your sense of justice, and human sympathy, continually telling you, that the poor

negro has some natural right to himself -- that those who deny it, and make mere merchandise of him, deserve kicking, contempt and death." Abraham Lincoln, Peoria Speech, 1854.

3. At Galesburg, the other day, I said, in answer to Judge Douglas, that three years ago there never had been a man, so far as I knew or believed, in the whole world, who had said that the Declaration of Independence did not include negroes in the term 'all men'. I reassert it today. I assert that Judge Douglas and all his friends may search the whole records of the country, and it will be a great matter of astonishment to men if they shall be able to find that one human being three years ago had every uttered the astounding sentiment that the term 'all men' in the Declaration did not include the negro. Do not let me be misunderstood. I know that more than three years ago there were men who, finding this assertion constantly in the way of their schemes to bring about the ascendancy and perpetuation of slavery, denied the truth of it. I know that Mr. Calhoun and all the politicians of his school denied the truth of the Declaration. I know that it ran along in the mouth of some Southern men for a period years, ending at last in that shameful, though rather forcible, declaration of Petit of Indiana, upon the floor of the United States Senate, that the Declaration of Independence was in that respect a 'self-evident lie', rather than a self-evident truth. But I say... that three years ago there never had lived a man who had ventured to assail it in the sneaking way of pretending to believe it, and then asserting it did not include the negro..." Lincoln, Lincoln's speech at Alton, during the Lincoln-Douglas debates.

4. Chief Justice Taney and Judge Stephen Douglas assert that the authors of the Declaration of Independence did not intend to include negroes. In this assertion, they do 'obvious violence to the plain, unmistakable language of the Declaration. I think the authors of that notable instrument intended too include all mean, but they did not intend to declare all men equal in all respects. They did not mean to say all were equal in color, size intellect, moral

developments, or social capacity. They defined with tolerable distinctness, in what respects they did consider all men created equal -- equal in 'certain inalienable rights, among which are life, liberty, and the pursuit of happiness.' This they said, and this they meant....They meant to set upa standard maxim for a free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere.' Lincoln, Speech of the Dread Scott decision, 1857.

5. 'Let us discard all this quibbling about this man the other man, this race and that race and the other race being inferior, and therefore must be placed in an inferior position. Let us discard all these things, until we shall once more stand up declaring that all men are created equal.' Lincoln, Chicago Speech, July 10, 1858.

6. "I trust I understand, and truly estimate the right of self-government. My faith in the proposition that each man should do precisely as he pleases with all which is exclusively his own, lies at the foundation of the sense of justice there is in me .... The doctrine of self-government is right -- absolutely and eternally right -- but it has no just application, as here attempted. Or perhaps I should rather say that whether it has such just application depends upon whether a negro is <u>not</u> or <u>is</u> a man. If he is <u>not</u> a man, why in that case, he who <u>is</u> a man may, as a matter of self-government, do just as he pleases with him. But if the negro <u>is</u> a man, is it not to that extend, a total destruction of self-government, to say that he too shall not govern <u>himself</u>? When the white man governs himself that is self-government; but when he governs himself, and also governs <u>another</u> man, that is <u>more</u> than self-government -- that is despotism. If the negro <u>is</u> a man, why then my ancient faith teaches me that 'all men are created equal'; and that there can be no moral right in connection with one man's making a slave of another." Lincoln, Speech on the Kansas-Nebraska Act, 1854.

7. 'It was impossible to raise the question of the status of the humanity of the Negro, without at the same time raising an equally vital question concerning the status of the humanity of white men. It was impossible to deny the Negro the natural rights demanded for all men by the Declaration of Independence without denying the natural foundation of the rights of white men. And it was impossible to change radically the way of conceiving of the white man's rights without changing radically the white man's life. Even if the legal foundation of American rights had remained the same -- which Lincoln believed impossible -- the changed conception of their extra-legal foundation in 'the laws of Nature and of Nature's God' would have been catastrophic to him. It would have been a change in the inner consciousness of the American citizen which would have sapped his moral dignity and have deprived him of his inner worth ...'

Harry V. Jaffa, Crisis of the House Divided: An Interpretation of the Issues in the Lincoln-Douglas Debates (Chicago: The University of Chicago Press, 1959), 303.

WW.

List of Quotations from Founders of the United States and Framers of the Constitution which Evidence the Principle that the Right to Life As a Natural and Inalienable Right Is Beyond the Power of Government to Withhold from any Class of Human Beings.

1. James Wilson

In this constitution (1789) all authority is derived from the people ... when a single government is instituted, the individuals of which it is composed surrender to it a part of their natural independence, which they before enjoyed as men. The Works of James Wilson, ed by James DeWitt Andrews, Callaghan & Co., Chicago (1896) Vol. I & II, James Wilson, Speech in Convention, November 16, 1987 p. 539, 545.

2. John Adams

Rights antecedent to all earthly government - Rights that cannot be repealed or restrained by human laws - Rights derived from the great Legislator of the universe. ... British liberties are not the grants of princes or parliaments, but original rights, conditions of original contracts ... coeval with government. ... Many of our rights are inherent and essential, agreed on as maxims, and established as preliminaries, even before a parliament existed. 3 Adams, Life and Works 448-64, at 449, 463.

3. John Adams

Whether we should recur to the law of nature, as well as to the British constitution, and our American charters and grants. Mr. Galloway and Mr. Duane were for excluding the law of nature. I was strenuous for retaining and insisting on it, as a recourse to which we might be driven by Parliament much sooner than we were aware. Adams,

Life and Works 374.

4. Alexander Hamilton

The sacred rights of mankind are not to be rummaged for, among old parchments, or musty records. They are written, as with a sun beam in the whole volume of human nature, by the hand of the divinity itself, and can never be erased or obscured by mortal power. Alexander Hamilton, "The Farmer Refuted." This can be found in Morton J. Frisch, ed., Selected Writings and Speeches of Alexander Hamilton (Washington: American Enterprise Institute for Public Policy Research, 1985), 21.

5. Alexander Hamilton

The law of nature [is] '... coeval with mankind, and dictated by God himself, [and] is, of course, superior in obligation to any other. It is binding over all the globe, in all countries, at all times. No human laws are of any validity, if contrary to this ...' Alexander Hamilton, ibid., 20. (quoting Blackstone's Commentaries)

6. Alexander Hamilton

In short, when human laws contradict or discountenance the means, which are necessary to preserve the essential rights of any society, they defeat the proper end of all laws, and so become null and void. Alexander Hamilton, ibid., 22.

7. John Dickinson

...[A] constitution is the organization of the contributed rights in society. Government is the exercise of them. It is intended for the benefit of the governed, of course [it] can have no just powers but what conduce to that end: and the awfulness of the trust is demonstrated in this -- that it is founded on the nature of man, that is, on the will of his Maker, and is therefore sacred. Fabius (John Dickinson of Pennsylvania), Letter IV.

8. Tench Coxe

This is a most enlightened time, but more especially so in regard to matters of government. The divine right of kings, the force of ecclesiastical obligations in civil affairs, and many other gross errors, under which our forefathers have lain in darker ages of the world, are now done away. The natural, indefeasible and unalienable rights of mankind form the more eligible ground on which we now stand ... On this solid basis is reared the fabric of our new federal government. These taken together form THE GREAT AND WHOLE OF THE AMERICAN CONSTITUTIONS, the fairest fabric of liberty that every blessed mankind, immovably founded on a solid rock, whose mighty base is laid at the center o the earth." Essay by a democratic Federalist (likely Tench Coxe), printed in the Philadelphia Independent Gazetteer, 26 November 1787.

9. James Madison

Let us recur 'to the great principle of self-preservation; to the transcendent law of nature and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim and to which all such institutions must be sacrificed.' James Madison, Federalist No. 43.

10. James Madison

Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe ... If 'all men are by nature equally free and independent,' all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights ... Either then, we must say, that the will of the legislature is the only measure of their [the people's] authority; and that in the plentitude of this authority, they may sweep away all our fundamental rights; or, that they are bound to leave ... [natural] right untouched and sacred ..." James Madison, "memorial and

Remonstrance," 1785. This can be located in Marvin Meyers, ed., The Mind of the Founder: Sources of the Political Thought of James Madison (Hanover: University press of New England, 973), 6-13.

11. Thomas Jefferson

'And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God? That they are not to be violated but with his wrath? Indeed I tremble for my country when I reflect that God is just; that His justice cannot sleep forever ...' Thomas Jefferson, Notes on Virginia, Query XVIII. In this passage Jefferson is speaking about the God-given, natural and inalienable rights of all human beings and referring specifically to the fact that one of these rights -- the right to liberty -- has been denied to some human beings, i.e., to "slaves."

Numerous commentaries express this view of the constitution framers' understanding of natural and inalienable rights.

1. The Declaration of Independence appeals to the "laws of nature and of nature's God "to justify the United States' break with Britain and to declare to a candid world the basis of the political order that will take its place. The purpose and limits of political life are determined by the rule of a higher law in the divine and natural order. It could be said that God and nature, in the founders' understanding, are man's supreme legislature. This natural standard of right, which transcends all human laws and constitutions, directs politics in two ways. First, it shows politics its proper end, namely the safety and happiness of the people. ... Law is called a rule, in order to distinguish it from a sudden, a transient, or a particular order: uniformity, permanency, stability, characterize a law. In this way James Wilson, who along with Hamilton and Madison was the most thoughtful of the Constitution's framers, distinguished a law from an ad hoc decision made regarding a particular case. ... The rule of law, in sum, is a

governmental practice designed to make as likely as possible the coincidence of the two requirements of just government: that it be by the consent of the people and that it secure the safety and happiness of society.

Saving the Revolution: The Federalist Papers and the American Family, Ed. by Charles R. Kesler, The Free Press, N.Y. (1987)

2. Yet the human nature that modern constitutions channel cannot be considered mere matter. Human beings are not a formless sea of humanity; they are not body but bodies, and each body has a form and an end that, though common to other bodies, distinguish it from other bodies: the self and its preservation. men are not unformed; the form is given by nature - in the state of nature, according to Locke. This form is arranged and managed in the constitution of civil society, but is not itself changed by the constitution maker. ... Civil constitutions exist to serve and protect the form and end that men have in the state of nature, the rights of *man*, not of citizens. America's Constitutional Soul, Harvey C. Mansfield, J.r, John Hopkins Univ. Press, Brittain (1991).

3. (a) There are, it is predicated, certain principles of right and justice which are entitled to prevail of their own intrinsic excellence, altogether regardless of the attitude of those who wield the physical resources of the community. Such principles were made by no human hands; indeed, if they did not antedate deity itself, they still so express its nature as to bind and control it. They are external to all Will as such and interpenetrate all Reason as such. They are eternal and immutable. In relation to such principles, human laws are, when entitled to obedience save as to matters indifferent, merely a record or transcript, and their enactment an act not of will or power but one of discovery and declaration. ...

(b) Thus the legality of the Constitution, its supremacy, and its claim to be worshipped, alike find common standing ground on the belief in a law superior to the will of human governors. ...

(c) That is to say the essential ingredient of the justice which is enforced by the state is not of the state's own contrivance; it is a discovery from nature and a transcript of its constancy. ...

(d) And the less casual evidence of everyday speech is to like effect: "the people of these United Colonies," "your whole people," "the people of America," "the liberties of American," "the rights of Americans," "American rights," "Americans." The constant recurrence of such phrases in contemporary documents bespeaks the conscious identity of Americans everywhere in possession of the rights of men. Natural rights were already on the way to become national rights. The Higher Law Background of American Constitutional Law, edward S. Corwin, Cornell Univ. Press, Ithica (1984), p. 4, 5 8, 80.

(2)

No. 92- 92-1934

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

J.M. INDIVIDUALLY

Petitioner,

- against -

V.C., [redacted]

Respondent.

VOLUME I OF PETITIONER'S APPENDIX
IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

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Co-Counsel for the Plaintiff

JOHN DOE, a fictitious name of a real person, individually; JOHN DOE, a fictitious name of a real person, guardian ad litem for his unborn infant child,	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MONMOUTH COUNTY DOCKET NO. MON-C-66-92
Plaintiff,	Civil Action
vs.	VERIFIED COMPLAINT
JANE ROE, a fictitious name of a real person; XYZ ABORTION CLINIC, INC. a fictitious name of real corporation doing business in the State of New Jersey; JOSEPH BLOW AND RICHARD ROE fictitious names of real individuals who are employees and agents of the defendant Corporation,	
Defendants.	

John Doe, a fictitious name of a real person, by way of Complaint against the defendants, says:

FIRST COUNT

1. John Doe, a fictitious name of a real person whose identity is disclosed in an affidavit filed with the court under seal, is a 38 year old man who resides in Monmouth County, New Jersey. Jane Roe, a fictitious name of a real person whose identity is disclosed in an affidavit filed with the court under seal, is a 32 year old woman who resides in Monmouth County, New Jersey. XYZ Abortion Clinic, Inc., a fictitious name of a real corporation doing business in the State of New Jersey, is a corporation which maintains facilities for medical procedures which include abortions, and is located in Monmouth County, New Jersey. The defendants Joseph Blow and Richard Roe, fictitious names of real persons, are employees and agents of XYZ Abortion Clinic, Inc., both of whom assist, direct and perform abortions at the location for XYZ Abortion Clinic, Inc.

2. In July of the year 1991, the plaintiff John Doe met the plaintiff Jane Roe and shortly thereafter started dating. In September of 1991, the plaintiff first proposed marriage to the defendant, Jane Roe, who advised the plaintiff that she would consider marriage but it was premature at that time. Thereafter, Mr. Doe and Ms. Roe continued to date and their relationship

grew. The plaintiff maintains that he loves the plaintiff Jane Roe and she has expressed similar feelings and emotions for him. In January of 1992 the defendant Jane Roe became pregnant with a child father by the plaintiff, John Doe. In February of 1992 Ms. Roe suspected pregnancy and personally performed a test which proved positive for pregnancy. She so advised the plaintiff and a repeat test was done while he was present. That test was also positive.

3. Upon initially hearing of Ms. Roe's pregnancy, the plaintiff was exhilarated and happy. He expressed optimism about the joy that they would derive from the two of them forming a new family. The plaintiff immediately proposed marriage and expressed his desire to assist in the rearing of the child. The defendant, Jane Roe, advised the plaintiff that she believed that she wasn't prepared to rear the child at this time and was considering an abortion to terminate the life of the child.

4. The plaintiff John Doe has continually advised the defendant, Jane Roe that he is prepared to marry her and live up to his obligations as father to the child. He has also advised her that in the event she could not feel able or was unwilling to rear the child that he would do so without her assistance. On Monday,

March 2, 1992, the defendant Jane Roe went to a doctor located in Monmouth County, New Jersey. Subsequent to her visit, she advised the plaintiff that the doctor confirmed that she is pregnant and that the unborn child is approximately eight weeks post conception. The plaintiff has continued to counsel defendant Jane Roe and advised her that he offers support for her and the child in any way necessary.

5. On Wednesday, March 4, 1992, defendant Jane Roe advised the plaintiff that she had determined with certainty that she would seek an abortion. She has continuously and at all times acknowledged that the plaintiff was the father of her unborn child. On Wednesday, March 4, 1992, the defendant Jane Roe advised the plaintiff that she scheduled an abortion for the morning of Wednesday, March 11, 1992 at a location in Monmouth County owned, controlled and operated by the defendant XYZ Abortion Clinic, Inc. and its agents and employees.

6. The plaintiff has a legal and moral obligation to discharge his duties to his unborn child. During the week of March 2, 1992, the defendant Jane Roe advised the plaintiff that she thought that it was an equal obligation that they share the cost of the abortion. The plaintiff, a Catholic, has a deep belief that he has a moral duty

to avoid in assisting in the termination of the life of his own child. He further holds a religious belief that he has a moral obligation to do what is necessary by way of affirmative action to care for, nurture and preserve the life, welfare and best interests of his unborn child. He therefore advised the defendant Jane Roe that he could not in good conscience spend money to terminate the life of his child. He believes that it is his obligation to pay considerably larger sums of money to preserve the life of his child and therefore he began to seek counsel on Thursday, March 5, 1992. On March 6, 1992, he contacted the attorneys of record and retained their services, the following day, Saturday, March 7, 1992.

7. As a matter of fact, the plaintiff's child fathered with the defendant, Jane Roe, is, at the age of eight weeks, a complete living human being at early stages of development. The unborn child is a member of the human race, is a human being and is a person. The unborn child has been and is currently a separate human being from his or her mother, with a complete and separate identity. The unborn child enjoys constitutional protection under the Fourteenth Amendment of the Constitution of the United States and Article One of the Constitution of the State of New Jersey. As natural father, the plaintiff is acting as the guardian ad

litem of his unborn child. The State of New Jersey, which licenses, regulates and supervises the medical activity at and on the premises of the XYZ Abortion Clinic, Inc., licenses, regulates and supervises the nurses and doctors at XYZ Abortion Clinic, Inc., would deprive the plaintiff's child of his or her constitutional rights if the state fails to intervene at the request of the plaintiff by denying the injunction he seeks.

8. The plaintiff, as father of his child, possesses a constitutional right to continued companionship with his child, has a constitutional right to procreate, has a constitutional right to discharge his obligations to his child. In addition, the plaintiff has the constitutional right to freedom of religion, the freedom to exercise the religion as he sees fit as long as it doesn't interfere with the legitimate rights of the state, his child and the child's mother.

9. The unborn child has the constitutional right to life both under the State Constitution and the Federal Constitution. The plaintiff has both the legal and moral obligation to protect the child's life and has the constitutionally protected right both under the Fourteenth Amendment and the State Constitution to defend the life of his own child. The failure of the State of New Jersey to

enter injunctive relief preventing the taking of the life of the plaintiff's unborn child, would be a constitutional deprivation of both the rights of the father and the child.

WHEREFORE, the plaintiff demands judgment on this count against the defendant, Jane Roe as follows:

a. Enjoining her from seeking an abortion anywhere in the State of New Jersey until further order of the Court;

b. Enjoining her from taking any action directly or indirectly aborting the child either individually or with the assistance of others in the State of New Jersey or elsewhere;

c. Enjoined her from leaving the State of New Jersey until further Order of the Court;

d. Enjoining her from disclosing her true identity or the identity of the plaintiff as long as the unborn child is alive or until further Order of the Court;

e. Or any other relief that the court deems just.

SECOND COUNT

1. The allegations contained in the First Count of this Complaint are incorporated by reference as if set forth at length herein.

2. The defendants, XYZ Abortion Clinic, Inc., Joseph Blow and Richard Roe, individually and in concert have arranged to have scheduled a medical procedure at the XYZ Abortion Clinic, Inc. hospital facilities on Wednesday, March 11, 1992 for the purpose of terminating the life of the plaintiff's unborn child. Their direct and indirect participation is material to the defendant Jane Roe's plan to terminate the life of the child she carries, fathered by the plaintiff.

WHEREFORE, the plaintiff demands judgment on this count against the defendant, Jane Roe as follows:

a. Enjoining each of them, their agents and employees from assisting Jane Roe in an abortion anywhere in the State of New Jersey until further order of the Court;

b. Enjoining each of them, their agents and employees, from taking any action directly or indirectly aborting the child either individually or with the assistance of others in the State of New Jersey or elsewhere;

c. Enjoining each of them, their agents and employees from disclosing the true identity of Jane Roe, or the identity of the plaintiff as long as the unborn child is alive or until further Order of the Court;

d. Or any other relief that the court deems just.

CASSIDY, FOSS & SAN FILIPPO
Attorneys for Plaintiff

BY: /s/ Harold J. Cassidy
HAROLD J. CASSIDY

VERIFICATION

1. I am John Doe, the plaintiff in the above entitled matter.

2. I have read the foregoing Complaint and on my own personal knowledge, I know that the facts set forth herein are true and they are incorporated in this certification by reference.

3. I certify that the above statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

/s/ John Doe
JOHN DOE, a fictitious name of a real individual whose identity is disclosed in an affidavit simultaneously filed with the Court and submitted under seal

DATED: March 8, 1992

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(908) 741-2525
By: Harold J. Cassidy
Attorneys for the Plaintiff

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Co-Counsel for the Plaintiff

JOHN DOE, a fictitious name of a real person Plaintiff vs. JANE ROE, a fictitios name of a real person, et al. Defendant.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MONMOUTH COUNTY DOCKET NO. Civil Action CERTIFICATION IN LIEU OF OATH OR AFFIDAVIT OF PLAINTIFF, JOHN DOE, IN SUPPORT OF APPLICATION FOR INJUNCTIVE RELIEF

John Doe, a fictitious name of a real person, being of full age, deposes and says:

1. John Doe is not my real name, but is a fictitious name that is being used for this law suit only. At the same time I file this certification, I file another certification which is submitted to the court in a sealed envelope which discloses my true name, present address, as well as the true name and address of the defendant named in this suit as "Jane Roe". I have filed an application with the court requesting that that particular certification be filed under seal and not be made part of a public record. Jane Roe is a

fictitious name of a woman that I have been dating since July of 1991. At the present time, she is eight weeks pregnant with my child. She has, under the circumstances described below, disclosed to me her intention to terminate the life of our child and the abortion procedure she seeks is scheduled for Wednesday, March 11, 1992. I seek to preserve the life of our child and ask the Court to enter an Order enjoining Jane Roe from submitting to the procedure and enjoining those employees of the stated hospital or abortion clinic from performing the abortion.

2. Firstly, I would like to comment on my beliefs concerning the importance of the preservation of the identity of Jane Roe. I seek to protect the identity of both the plaintiff and the defendants in this case for the best interests and well being of both Jane Roe and our infant child. For myself, my own privacy is not of importance. I ask that the court permit the suit to go forward in the name of John Doe, however, because I believe that once my identity is known the identity of my child and the baby's mother could be learned. I am advised by my attorneys that these pleadings are a matter of public record, and once in the public domain are discoverable by anyone who seeks them.

3. I am very concerned that Jane Roe's privacy and identity be kept anonymous. At the present time she is eight weeks pregnant with our child. I have offered to marry her and I have told her of my desire to fulfill my obligations as father, both in assisting with the raising of the child and in extending financial support, whether or not she decides to marry me. I am presently 38 years of age and Jane Roe is presently 32 years of age. However, I know that her decision to terminate the life of our child has been difficult for her. The plight of any unwed mother when she discovers she is pregnant is always one which requires compassion and understanding. This is particularly true with Jane Roe. I love her and I understand what a good person she is. I have no reason to believe that Jane is motivated by anything other than what is the right thing to do. I have expressed my beliefs at what is right and she has shared her thoughts with me. We are in disagreement. I do not believe it would be right for me or anyone else to deliberately make her circumstances more difficult than they currently are. I recognize that as the mother who is carrying the child she is in a different position that I am and the decision making process concerning the future life of our child may be more difficult for her. I ask that the Court honor my request that her

true identity as contained in my other certification that I filed with the court in a sealed envelope, not be disclosed. I also ask the court to take whatever steps that are necessary to see that other's don't disclose her name. This is not only for her sake but for the sake of our child.

4. I truly believe that it is important for our child that the fact of this law suit is never known by him or her. I hold out hope, and I possess a measure of trust, that this law suit may well result in saving the life of our unborn child. If that happy result is achieved, then I think it is important for the well-being of our child that he or she never know that this dispute took place. I fervently hope that Jane Roe voluntarily changes her mind, but if she does not and this suit is successful, in the long run I do not believe it is good for our child or Jane for the child to ever learn that the baby's mother intended to terminate his or her life. I therefore strenuously urge the court to do everything in its power to protect the identity of our unborn child. If it is necessary to protect my identity so it is not subsequently discovered, then I ask that the plaintiff's name be protected as well.

MY INTENTIONS AND THE RELIEF SOUGHT IN THIS SUIT

5. My purpose in filing this suit is to preserve the life of my child. I believe that that is both my legal and my moral obligation. Once our child's life is out of danger, I would seek to fulfill my obligations to my child. I shall live up to my financial obligations and shall take the responsibility of being a father to our child, whether or not Jane ever agrees to marry me. As far as my parenting role in the life of the child is concerned, it in large part depends upon Jane's wishes. I have been advised by my attorney that if Jane gives birth to our child, under existing New Jersey Law, and the circumstances of this case she essentially has the right to choose to be the primary custodian if we are not married. If Jane chooses to be the primary custodian of the child, I would respect her wishes and do the best job I can as a father in whatever role I can play within the limits of the court's permission. In the event Jane chooses not to be the primary custodian of our child, I would be more than delighted to fulfill that role. Naturally, I would welcome the circumstance in which both Jane and I can raise the child together. If I am not the primary custodian of the child, it is my intention to live up to my financial obligations as well as my obligations as a father.

6. In the current lawsuit, I seek to preserve the child's life. I have been advised by my counsel that a suit dealing with the custodial arrangement of the child (if a dispute were to arise) would wait until it has been determined if the child's life has been preserved.

BACKGROUND

7. Both Jane and I have had first marriages and both of us are divorced. I started dating Jane in July of 1991. Over the past year we have both expressed love and affection for one another. Even prior to the conception of our child eight weeks ago, we discussed marriage.

8. When Jane first told me that she was pregnant in February of 1992, I was very excited. Obviously we did not plan this pregnancy, but when I learned that I would become a father at the age of 38, I was overjoyed. The news, to me, was wonderful and caused not only joy, but celebration. I discussed marriage with Jane, but she expressed confusion and doubt. She didn't know if she was ready to raise the child and commit to marriage and motherhood. I love Jane and I have done the best I could to understand her feelings and the position she is in. I know that she faced, for her, a very difficult decision. If Jane actually obtains the

abortion, she may regret it the rest of her life. Whatever legal and moral rights she may have, she must make the decision for herself. What I seek to do in this suit is not to make decisions for her, but to exercise what I perceive to be my own fundamental obligations to my child, and obligations to myself. Whatever legal and moral rights she may have, they can only be viewed in the context of the consequence of her act upon our child and also on my own rights and obligations. I don't wish to denigrate her concerns she may have. When balanced, however, I believe that her concerns are far outweighed by the considerations of the loss of our child's life and the denigration of my own rights and perhaps, the denigration of my own sense of duty and sense of obligation.

MY DECISION TO FILE THIS SUIT

9. It was on Wednesday, March 4, 1992 that Jane told me with certainty that she would seek an abortion. Until that time I had believed there was a chance that I could persuade her that we could raise the child and she should not do anything to jeopardize the baby's life. She told me that she made an appointment to have the abortion and she gave me the identity of the clinic where it would be performed. She asked me to contribute to half of the costs of the abortion because "we are equally obligated." It was

on Thursday, March 5, 1992 that I decided to seek legal counsel. It was on that day that I made calls to secure an attorney and I retained counsel on Saturday, March 7, 1992.

10. My moral and legal obligations are clear. When Jane, without meaning any harm or hurt, suggested that I pay for half the costs of an abortion, I realized that I am morally obligated to refuse to assist the taking of the life of my own child. I would prefer and feel required to expend greater sums of money in an effort to save my child's life, rather than spend a mere couple of hundred dollars to take that life.

11. I believe that I have a moral and legal obligation to take whatever legal action is necessary to save the life of our child. I am a Roman Catholic and I believe in many of the teachings of the Catholic Church. I believe that life begins at conception and we all have an immortal soul. I do not believe that I am free to think that the obligations to our child are that of the child's mother only. My responsibilities exist independent of hers and my obligations include not only to refrain from assisting in terminating the life of our child, but taking whatever action is appropriate and necessary to preserve the child's life. A failure to do so would be a failure to discharge my legal and moral obligations. The beliefs that I

espouse in this particular paragraph are part of my religious beliefs and I believe that I will be held accountable if I do not discharge these obligations in a fair way.

12. I hereby certify that the foregoing statements made be me are true. I am aware that if the foregoing statements made be me are wilfully false, I am subject to punishment.

/s/ John Doe
JOHN DOE, a fictitious name of a real person whose identity is disclosed in an accompanying affidavit presented to the court sealed.

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By: Harold J. Cassidy
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Co-Counsel for the Plaintiff

JOHN DOE, a fictitious name of a real person Plaintiff vs. JANE ROE, a fictitios name of a real person, et al. Defendant.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MONMOUTH COUNTY DOCKET NO. Civil Action CERTIFICATION IN LIEU OF OATH OR AFFIDAVIT OF PLAINTIFF, J M , THE PLAINTIFF DESIGNATED BY THE FICTITIOUS NAME

J M being of full age, deposes and says:

1. My name is J M and I am 38 years of age. My social security number is . My current address is with my mother at , New Jersey . I recently sold my residence in Long Branch and since March 1, 1992, six days ago, I temporarily , New Jersey known as the . I have been in .

2. I checked into the because it is near and I wanted to be close to my girlfriend and the mother of my child and

this particular time. It was Monday, March 2, 1992 that a doctor confirmed that my girlfriend, designated Jane Roe in the caption of this suit was pregnant with the child I fathered.

3. The woman designated Jane Roe in this case is V C, who resides at , New Jersey.

4. I first learned that V was pregnant at the end of February. V had first performed a test that was positive. Then a test was conducted in my presence which was also "positive". It was at that time that I felt elated and expressed my desire to marry V . It wasn't until March 2, 1992 that V was at a doctor's office in F . I don't remember the doctor's name, but V told me that the doctor's test was positive and the doctor confirmed that the baby was eight weeks old. On Wednesday, March 4, 1992, V told me that she definitely made up her mind that she would have an abortion. She knew how strongly I felt, but for her own reasons she felt that the situation wasn't right. She told me that she had an appointment for Wednesday morning March 11, 1992 at an abortion clinic in , New Jersey. The name of that clinic is the and is located at , New Jersey. In my effort to keep V identity protected and for her sake as well as the sake of our child, I am

asking the court to seal this certification to protect even the name of the clinic. The Orders that I seek, if granted, should not contain the name of the clinic because I fear that V 's identity would be learned. For that reason, I have requested that the form of an Order for an Injunction include restraints against all involved from disclosing the identity of the unborn child's mother.

5. I hereby certify that the foregoing statements made be me are true. I am aware that if the foregoing statements made be me are wilfully false, I am subject to punishment.

/s/ J.M.
J M

Dated: March 8, 1992

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Red Bank, NJ 07701-0896
(908) 741-2525
By: Harold J. Cassidy
Attorneys for the Plaintiff

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Co-Counsel for the Plaintiff

J.M., individually and as guardian ad litem of his unborn unborn child Plaintiff, vs. V.C.; W.M.C.; JOSEPH BLOW AND RICHARD ROE, fictitious fictitious names of real individuals who are employees agents of the defendant corporation Defendants.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MONMOUTH COUNTY DOCKET NO. MON-C-66-92 CIVIL ACTION CERTIFICATION IN LIEU OF OATH OR AFFIDAVIT OF HAROLD J. CASSIDY, ESQ. SUBMITTED UNDER RULE 1:4-4(c) (FACSIMILE SIGNATURE)

Harold J. Cassidy, being of full age, deposes and says:

1. I am an attorney at law of the State of New Jersey and a member of the firm of Cassidy, Foss & San Filippo and I am thoroughly familiar with the manner in which a certification was received from Dr. Jerome LeJeune from Paris, France.

2. The certifications in lieu of oath or affidavit that was submitted by Dr. LeJeune contained a signature which is a facsimile of the original signature.

3. This is to certify that Dr. LeJeune acknowledged the genuineness of the signature. I personally spoke to him on Wednesday morning, March 18, 1992. I certify to the court that if requested I shall secure an original signature from Dr. LeJeune. Naturally, there is a certain process and a certain period of time that this would take.

4. I hereby certify that the foregoing statements made be me are true. I am aware that if the foregoing statements made be me are wilfully false, I am subject to punishment.

/s/ Harold J. Cassidy
HAROLD J. CASSIDY

DATED: March 18, 1992

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(908) 741-2525
By: Harold J. Cassidy
Attorneys for the Plaintiff

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Co-Counsel for the Plaintiff

J.M., individually and as guardian ad litem of his unborn unborn child Plaintiff, vs. V.C.; W.M.C.; JOSEPH BLOW AND RICHARD ROE, fictitious fictitious names of real individuals who are employees agents of the defendant corporation Defendants.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MONMOUTH COUNTY DOCKET NO. MON-C-66-92 CIVIL ACTION CERTIFICATION IN LIEU OF OATH OR AFFIDAVIT OF JEROME LEJEUNE

Jerome LeJeune, being of full age, deposes and says:

1. I am a resident of Paris, France. I am on the faculty of the Medical School at the University of Paris (France) and a professor at the Research Center of the Human Genetics and Brain Diseases, which has the following address:

Centre De Recherches
Genetique Humaine Et
Maladies De L'Intelligence

Institute De Progenes
45, rue des Saints-Peres
75270 Paris Cedex 06

2. On April 13, 1991 I testified in the Municipal Court in Morristown, New Jersey, in the matter of State of New Jersey v. Alexander Loce, et al. The testimony in that case has been memorialized in a transcript. The portion of the transcript that contains my direct testimony is attached to this certification.

3. All of the genetic information necessary and sufficient for a particular human being exists at the moment when the human life begins at conception. The life of each of us commences at the moment that the genetic information is complete and a unique individual is created. This event occurs when the head of the male sperm penetrates inside the female's ovum. The information carried by the father encounters in the same recipient cell the information carried or transmitted by the mother so that suddenly, almost instantaneously, a new constitution is spelled out in genetic terms.

4. The once held belief that a mother contributes to the make up of the child following conception is now known with certainty

to be false. Everything that is necessary to be a human being is present immediately after conception. Either the whole information is present for conception of a human being (and development to full stages of growth) at the moment after the entry of the sperm into the ovum or the genetic information is insufficient and no human being shall develop and conception will fail.

5. The completeness of the human being immediately upon conception is such that there is a specificity of both the species and the complete identity of the individual member within the species. Not only is it possible to identify the resultant cell after conception as being human in nature, the individual identity or person is known and can be identified. In each instance, this marvelous phenomenon at the moment of fertilization (conception) is a pure novelty which has never occurred before in the history of mankind: a new constitution of a personally devised constitution for a particular person. This new constitution is complete in all of itself which is capable of being identified, its genetic material being capable of being read and the makeup of chromosomes complete. We have, in short, a human being immediately after the moment of conception.

THE PROCESS OF FERTILIZATION

6. Just prior to conception there are thousands of sperm swimming around one single female egg and through the process of nature, one sperm is elected which will penetrate the egg or ovum. There is in this process of fertilization an extraordinary device employed by nature to protect the privacy of the life of the person immediately upon conception. The right of privacy is actually written into the law of nature. The egg, which is a little sphere of one and one-half millimeters in diameter, is protected by a transparent membrane which completely covers the egg. This membrane is known as the zona pellucida. Immediately upon a sperm burrowing inside the zona pellucida, the transparent membrane suddenly becomes physically changed. Within micro seconds it becomes completely impenetrable by any other sperm.

DNA AND THE SOURCE OF GENETIC INFORMATION

7. The necessary genetic information to create a human being is contained in DNA, a long thread molecule. Physically, it is analogous to a minute flat ribbon of tape that is used in a tape recorder. Inside the head of a sperm is a long thread of one meter or so which is so tightly coiled in twenty-three little pieces that the whole of its volume can be put upon the point of a needle. These twenty-three pieces are chromosomes. The ovum also contains

twenty-three little chromosomes. In addition, inside the ovum there are billions of molecules specialized which will recognize and be recognized by the signals given by the genetic make up. The information provided by the male sperm is approximately fifty billion bytes of information. However, the information contained inside the egg is much greater, so much so that it is presently uncountable, so that the greatest computers cannot hold the amount of information which is inside one reproductive cell once fecundation occurs.

8. This process is like a tape recorder which plays music. If one places a mini cassette on which the music of an artist such as Mozart is recorded and put it in a tape recorder, you experience the sound of a symphony. The tape itself has no notes of music and there are no musicians. Because there is a special code written on the tape, information is conveyed in such a way that the tape recorder will read it and make air move through a loud speaker. What is being experienced by the listener is not an orchestra, not musicians, not evidence of music, but the genius of the author. That is how life is played: inside the egg, which receives the tape band from the father and which has its own tape bands, there forms a sort of table or law of life. Within the egg is a tremendous

amount of information to be received and interpreted. The genetic information necessary to form the completed human being is not only the long ribbon of DNA (which through the analogy is the mini cassettes of the symphony) but information in the cell itself, which reads it. The cell is analogous to the magnetiscope of the tape recorder and possesses within it enormous information.

THE RECENT DISCOVERY OF THE JEFFREY METHOD AND BAR CODE PERMITS IDENTIFICATION OF THE MEMBER OF THE HUMAN SPECIES IMMEDIATELY AFTER CONCEPTION AND SUPPORTS THE CONCLUSION THAT A HUMAN BEING EXISTS AT CONCEPTION.

9. Approximately four years prior to the trial in this matter a Englishman named Jeffrey made a discovery and developed a technique which has the capability of determining the identity of a particular human being. Jeffrey discovered that in part of the chromosomes the DNA is repetitive. It can be repeated as much as one hundred times, so if harm is caused to some of the segments, some of the sequence will provide the genetic function and the human being will survive. In his work, Jeffrey developed a method of extracting DNA and a technique for examining it. The technique creates the ability to record unique traits of the individual being examined. Jeffrey's technique has proven that

each person is unique and that the sequence of the bars that he is able to identify is absolutely typical of the person being examined and is specific to the individual. That the identity of the person or the individualization of the member of the human race takes place at conception has been confirmed by the Jeffrey method.

METHYLATION OF CYTOSINE REPRESENTS A VERY RECENT DISCOVERY WHICH EXPLAINS THE SCIENCE OF GENETICS PREVIOUSLY UNKNOWN. IT SUPPORTS THE CONCLUSION THAT THE HUMAN BEING IS A COMPLETE PERSON AT THE MOMENT OF CONCEPTION.

10. Totally unknown as recently as four years ago (and unavailable when Roe v. Wade was decided) was the process of Methylation of Cytosine (which is contained on a piece of DNA). What has been learned is that the DNA is even more sophisticated than previously suspected and the messages are written "letter by letter", piece by piece. There is basic information with indications that some information must be read immediately and some information must be read at a later time. What is meant by the Methylation process is that everything to make this particular human being exists at fertilization, but is not read at the instant of conception. This discovery was never expected ten years ago and never predicted: that, in fact, the father's genes underline

instructions to immediately produce the membranes inside which the embryo will develop itself (its space capsule) and to make the placenta which is the body by which it will take the nutrients from the vessels of the mother. That information is contained or underlined in the sperm not in the mother's egg. The male genetic material therefore builds the membranes which becomes the shelter and the placenta which is the food gathering system. The female information acting in concert with the male information provides the mechanism for the development of the parts of the physical anatomy.

11. All of this information and the sophisticated directive mechanisms is contained in the first cell. The significance of this information is that it was discovered that it is definitely ruled out that there can be a genetic constitution made from one parent only. It is not possible in an egg to put two pronuclei from the mother only. It will not be a human being. It can make "parts" such as skin, hair, teeth, some nervous cells, but not at all build a form and there will be no child. Essentially the same thing is true without the maternal nuclei. It will not form a human being. So it is absolutely required that, in the first cell, there be the DNA

underlined by Methylation in the male way and the DNA Methylation in the female way for there to be a human being.

12. The extraordinary observation made is that the only cell in all of the life of a person in which those two Methylation systems from father and from mother are present together inside one cell is in the very first cell which gives life to a person. At each progressive stage of development this Methylation is erased and replaced progressively as cells learn by a cascade of reaction to specialize so that some cells will develop to form the brain, another to make the liver, another to make bone, etc. It has been learned that the male way of "spelling" is obligatory for muscles so that even in the female information which builds the muscles has to be underlined in the paternal way. This understanding contradicts any previous notions that fetal development occurs only through the mother. It is now clear that the child is a complete human being programmed for life from conception.

THE SCIENCE OF GENETICS IRREFUTABLY CONCLUDES THAT A FERTILIZED EGG, IMMEDIATELY AFTER THE MOMENT OF CONCEPTION, IS A MEMBER OF THE HUMAN SPECIES, IS A HUMAN BEING AND IS A PERSON.

13. To conceptualize the person at the age of eight weeks post conception, we should describe what the child looks like. The child was only the size of a person's thumb measured from its head to it's "rump", one inch. Inside the human embryology the child can be visualized as a tiny human being with fingers, toes, a face and palm prints that you could read with a microscope. You would be able to see the child's sex. The child has a heart beat and with the mother there are two rhythms between her heart and the child's which are detectable. The child's heart beats about one hundred and forty times a minute if it is a boy and about one hundred and sixty times a minute if it is a girl. An abortion of an eight week only fetus kills a member of the human species. That there is completeness of the human being and its identity as a person from the moment of conception when its chromosomal make up is complete not only as to the species but as to the individual member of the human race is irrefutable. There exists a specificity of the uniqueness of a human being at the beginning of life, at fecundation, at fertilization at conception.

14. I understand that this certification is being submitted in the New Jersey Courts in a law suit entitled J.M. v. V.C., W.M.C., et al., currently pending in the Superior Court of New Jersey,

Chancery Division, before The Honorable Patrick J. McGann, J.S.C. I understand that this case is a civil action brought by the father of an unborn child seeking to enjoin an abortion. It is to be made part of the record on an Order to Show Case and in opposition to a motion to vacate the restraints.

15. I hereby certify that the foregoing statements made be me are true. I am aware that if the foregoing statements made be me are wilfully false, I am subject to punishment.

/s/ Jerome LeJeune
JEROME LEJEUNE, M.D.

DATED: 18-03-92

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J.M., individually and as guardian ad litem of his unborn unborn child Plaintiff, vs. V.C.; W.M.C.; JOSEPH BLOW AND RICHARD ROE, fictitious fictitious names of real individuals who are employees agents of the defendant corporation Defendants.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MONMOUTH COUNTY DOCKET NO. MON-C-66-92 CIVIL ACTION CERTIFICATION IN LIEU OF OATH OR AFFIDAVIT OF JEROME LEJEUNE

Jerome LeJeune, being of full age, deposes and says:

1. I am a resident of Paris, France. I am on the faculty of the Medical School at the University of Paris (France) and a professor at the Research Center of the Human Genetics and Brain Diseases, which has the following address:

Centre De Recherches
Genetique Humaine Et
Maladies De L'Intelligence

Institute De Progenes
45, rue des Saints-Peres
75270 Paris Cedex 06

2. On April 13, 1991 I testified in the Municipal Court in Morristown, New Jersey, in the matter of State of New Jersey v. Alexander Loce, et al. The testimony in that case has been memorialized in a transcript. The portion of the transcript that contains my direct testimony is attached to this certification.

3. I incorporate by reference the testimony I gave in the matter of State v. Loce in this certification. I understand that this certification is being submitted in the New Jersey Courts in a law suit entitled J.M. v. V.C., W.M.C., et al., currently pending in the Superior Court of New Jersey, Chancery Division, before The Honorable Patrick J. McGann, J.S.C. I understand that this case is a civil action brought by the father of an unborn child seeking to enjoin an abortion. It is to be made part of the record on an Order to Show Cause and in Opposition to a Motion to Vacate the Restraints.

4. I certify to Judge McGann and the New Jersey Courts that the testimony that I gave in the matter of State of New Jersey v.

Alexander Loce, et al., which is attached to this certification, is truthful and accurate and I incorporate it by reference.

5. I hereby certify that the foregoing statements made be me are true. I am aware that if the foregoing statements made be me are wilfully false, I am subject to punishment.

/s/ Jerome LeJeune
JEROME LEJEUNE, M.D.

DATED:

JEROME LEJEUNE, M.D., Ph.D., having been duly sworn according to law, testified as follows:

THE JUDGE: Doctor, I heard you pronounce your own name and we butchered it. So you may have a seat.

All right, you may proceed counsel.

DIRECT EXAMINATION BY MR. MULLANEY:

Q Doctor LeJeune, could you please for the record, state your name and how to spell it?

A Your Honor, my name is Jerome LeJeune.

Q We did butcher that one.

A Yes. I am a professor of fundamental genetics in the Children's Hospital of Paris and the Faculty of Medicine of Paris.

And I began as a pediatrician and then I became a geneticist. Now I am a pediatrician and a geneticist.

And in my consultation, which is probably the biggest in the world for mentally retarded children having difficulty due to a chromosomal mistake, we examine every year 2000 children, and we have record of 30,000 of them.

So our job is really to try to understand what makes the nature of every human being; why some of them are afflicted by constitutional difficulty, and to try later to treat that, if we can, so that we would be able to some day to bring them back to normal; and to give them what nature has refused to them.

Q Dr. LeJeune, could you please tell the Court a little about your educational background?

A As I staid I was MD and PhD, and have been always in Paris as a student.

And later when I finished by studying and I got my degree in medicine and genetics, I was representative of France in the United Nations scientific committee on the danger of atomic radiation, because I was a geneticist.

And in that function, international function, I came very often to the United States to go to the UN and I met one professor of California Institute of Technology.

And I was invited to give the first course of human genetics in Cal Tech because in his highly educated university they had not yet had any course of human genetics.

They had a lot of course in fundamental genetics. I was the first professor of fundamental genetics in Cal Tech.

Q As part of your serving on this committee, Doctor, did you have opportunity to go to the Kremlin in moscow and meet with Mr. Brezhnev?

A yes. That is as a geneticist, I was vice-president of the Genetic Congress in Moscow and I was known by my fellow professor of genetics in Moscow and because I am a member o the Pontifical Academy of Science and because I was a member of the, of a special group that we had to study of the dangers of atomic war I was sent by the Pope, John Paul II, to Moscow.

It was around three days after Mr. Jaruzelski had declared the war against people in Poland; in other words, declared a state of war against its own population.

And because we had prepared the reports about the dangers of -- as a specialist I was only speaking of the genetic dangers of the atomic war, then the Holy Father wanted me to be presenting a report to all the powers of the world who were having the atomic power.

And so some of us of the Pontifical Academy of Science went to America to see Mr. Reagan and some came to France or England to China and India. And I was sent by the Holy Father to see Mr. Brezhnev.

And it was a very curious situation. But I am not going to talk too much about that.

Q Dr. LeJeune, you have been credited with the first discovery of the first chromosomal abnormality in man.

Could you please tell the court about your discovery of Down's Syndrome?

A Yes. Down's Syndrome is a very peculiar disease in the sense that the baby who are born with it owe their difficulty to an excess of genetic material.

And it was long ago, nearly thirty years ago that I discovered that they had an extra chromosome and this chromosome is now known as number 21.

The classification of chromosome was not yet established at that moment because it was the first disease to be discovered to be due to this chromosomal defect.

And those babies, in fact, suffer because they have too much of those table of the law of the life which we call chromosomes.

And to make a very complex story short I would say that inside the chromosomes are written in a very special ribbon, which is DNA, all the tricks of the trade to be a human being, if those chromosomes are human chromosomes.

If they are chimpanzee chromosomes, all the tricks to be a chimpanzee are written.

Q Doctor LeJeune, we are trying to qualify you as expert at this point.

A Yes.

Q We will get into that in a minute. I have to cut you off because it's an interesting story. For your discovery of Down's Syndrome did you win any awards?

A Well, I had the honor or receiving the Kennedy Prize from the hands of the late president and, because of this discovery, and got also the William Allen Memorial medal in this country which is the highest prize that you can get in genetics in the world.

It is given by the American Society of Human Genetics in this country. I received it in San Francisco.

Q What year was that, Doctor?

A Oh, I am not good with the remembering the times. It was, if I'm correct, around '62 or '64. I think that the Kennedy Prize was '64.

Q Could you tell the court -

A That's -- I's sorry. I don't remember.

Q Could you tell the Court of any other boards or academies of which you're a member?

MR. BANGIOLA: I am prepared to stipulated the witness as an expert in genetics. Excuse me.

MR. MULLANEY: Your Honor, it is just not that often we get someone with the stature of Dr. LeJeune. But if the Court is willing to recognize him, I offer the Court Dr. LeJeune as expert in genetics and human reproduction.

THE JUDGE: And prosecutor is willing to stipulate that?

MR. BANGIOLA: Without objection.

THE JUDGE: The doctor who discovered Down's Syndrome is an expert in genetics.

MR. BANGIOLA: Doesn't seem like much of a stretch.

THE JUDGE: I will accept that stipulation and welcome you to the Morristown Municipal Court.

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J.M., individually and as guardian ad litem of his unborn unborn child Plaintiff, vs. V.C.; W.M.C.; JOSEPH BLOW AND RICHARD ROE, fictitious fictitious names of real individuals who are employees agents of the defendant corporation Defendants.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MONMOUTH COUNTY DOCKET NO. MON-C-66-92 CIVIL ACTION CERTIFICATION IN LIEU OF OATH OR AFFIDAVIT OF BERNARD NATHANSON, M.D.

Bernard Nathanson, M.D., being of full age, deposes and says:

1. I am a doctor of medicine licensed to practice medicine in the State of New York. I am board certified in obstetrics and gynecology and I maintain my practice at 133 East 80th Street, New York, New York.

2. On April 13, 1991 I testified in the Municipal Court in Morristown, New Jersey, in the matter of State of New Jersey v. Alexander Loce, et al. The testimony in that case has been memorialized in a transcript. The portion of the transcript that contains my direct testimony and some cross examination has been attached to another certification and submitted to the court in this case.

3. My understanding is that this affidavit is being used to support an application by the plaintiff in this case to restrain an abortion of his unborn child. I understand that this certification will be filed in opposition to a motion to vacate the restraints, and that this certification will be used in support of permanent restraints.

4. Current knowledge of modern medicine and its recent developments all support and are consistent with the conclusion that an individual member of the human race, one separate and apart from its mother, has a life immediately following conception.

THE ANATOMY OF THE FEMALE REPRODUCTIVE SYSTEM

5. The uterus, the key organ of the female reproductive system, is a pear shaped organ which has at its lower end the cervix. The cervix is a narrowing which resembles a "bottle neck".

It contains within it a cavity and is positioned above the vagina which is the lower most point of the female reproductive system.

6. At the top of the uterus on both sides are fallopian tubes. They function as a conduit for descending eggs from the mother's ovaries. The ovaries are located above and at the outer limits of the fallopian tubes on both sides. The function of the ovaries are to manufacture, or produce the female eggs or ova. The egg "pops" out of the ovary and is caught by the tube.

7. The fertilization of an egg actually takes place within one of the fallopian tubes itself, in an outer portion of it which is designated the "ampulla".

THE DEVELOPMENT OF THE UNBORN CHILD IN THE FIRST EIGHT DAYS OF LIFE

8. During the first eight days following conception, the unborn child develops additional cells, descends from the fallopian tube, burrows into the lining of the uterus and there is an "interfacing" of the child and mother's circulation.

9. It is while the child is in the early days of life that it (descriptively referred to as "the fertilized egg") begins to "divide" the numbered cells go from one to two, four, then eight and then

sixteen. When the development of the child reaches the sixteenth cell stage, the child is referred to by the biological term "morula".

10. At this stage of development, the unborn child is approximately three days of age and proceeds into the uterus where it continues to divide and develop. By the sixth day, the early human being is actually in contact with the lining of the uterus which is known as the endometrium period as the division progresses and the baby attaches to the uterine wall. The developing human being is within the form of a cell mass referred to as a "blastocyst", which actually is in contact with the uterine wall. At this point there will shortly be a recognizable unborn child and the outer layer of cells, which is referred to as a trophoblast, will form the placenta.

11. As the blastocyst burrows into the lining of the uterus it erodes the maternal blood vessels and nexus begins to form between the mother and the child resulting in an "interface" between the mother's circulatory system and that of the child. It is at this stage of development, eight or nine days of age following fertilization, that the unborn child is detectable within the mother through normal testing methods.

12. It is through the detection of a pregnancy hormone referred to as "beta sub unit HCG" that medical confirmation that *there is a growing living human being within the maternal uterus* is possible. During the first eight or nine days of the child's development this tiny member of the human race has exhausted its own stored up oxygen and nutrients. So at this age the bridge is established between the unborn baby and the mother and the baby begins to extract the nutrients and oxygen from her. In order to accomplish this link, the trophoblast (the outer layer around the blastocyst) actually scouts into the tissue of the uterus for blood vessels. The trophoblast has the power to open up maternal blood vessels which causes hemorrhaging around the baby. From the blood which is surrounding the child at that point the child begins to extract certain necessary nutrients, chemicals and even oxygen.

THE STAGES OF GROWTH OF THE UNBORN CHILD IS A SEAMLESS CONTINUUM FROM CONCEPTION TO BIRTH

13. The English language is burdened with terms developed at times in the history of medicine when it did not possess the current level of knowledge. Consequently, there are terms to describe the particular "stages of growth". However, it was emphasized at trial that it is important for one to understand that

"stages of growth and development" of the new human being is really a "seamless continuum".

14. Immediately upon conception the "fertilized egg" has been referred to as a zygot. At the age of three days the child has developed from a single cell to a sixteen cell individual termed "morula". The term "embryo" connotes the developing human being from the morulus stage to about the end of the eighth week following fertilization. The term "fetus" is used to describe the stage of the development of the human being from the end of the eighth week up to the time that the baby is actually delivered whatever the age of the child at birth.

15. The terms zygot, morula, embryo and fetus are only terms of development of the same human being just the same as the terms "infant", "child", "adolescent" and "adult" also describe different stages of development of the human being. Development of the person from the moment of conception is "seamless" with continuing growth and aging of the person from the moment of conception.

TECHNOLOGICAL DEVELOPMENTS SINCE 1976 (THREE YEARS AFTER ROE V. WADE) HAS RESULTED IN GREATER KNOWLEDGE OF THE NATURE OF THE UNBORN CHILD IN THE EARLY STAGES AND HAS PERMITTED SOPHISTICATED

SURGERY ON CHILDREN ONLY FOUR AND FIVE MONTHS AFTER CONCEPTION.

16. There were crude ultrasound devices that were available in the early 1970's dating back to its development in the 1950's. These instruments permitted limited access to knowledge about the child during the early stages of growth following conception.

17. In 1976 there was a major development in technology called "real time ultrasound". Whereas the old technology showed static pictures, the new technology actually created a motion picture which could detect not only movement but function, breathing, urination, swallowing and other functions of the human existence. It became possible to trace the development of the unborn person from literally the very beginnings (at conception) all the way through the child's development up to its birth. This technology, currently in color, permits detection of such things as blood flow through a fetus and embryo. Doctors using the instrument can actually see the red blood on the screen itself as the vessels transmit the flow of blood through the child's circulation.

18. This level of visualization permits examination and diagnosis of the child's illnesses while in its mother's womb.

Medicine can watch how the child functions including such intricate detail as the operation of the tiny little valves and the heart as it flops up and down pushing blood. Abnormalities in things such as heart valves can be detected and rather sophisticated operations are currently performed on unborn children at the developmental stages of four and five months. It was not until 1990 that the first book was published describing this sophisticated fetal surgery in which the mother is anesthetized, her abdomen surgically opened and the uterus incisioned. In these operations the amniotic fluid is suctioned out and the baby is actually removed from the mother's uterus while he or she is still attached by the umbilical cord. The baby's abdomen or chest (whatever bodily organ is defected) is incised surgically, repaired, and the child is replaced into the mother's uterus, the amniotic fluid put back around the baby, and the mother repaired. The child is able to proceed through the pregnancy to, at or near full term. These operations are done at relatively early stages of development of the child.

19. In addition to the development, since Roe v. Wade, of the sophistication of ultrasound technology, medicine has developed the additional modality of the electronic fetal heart monitor which

permits sophisticated investigation of the fetus. The electronic fetal heart monitor tracks the fetal heart rate from moment to moment and it can detect reactions of the unborn child to such things as different types of music.

THE FUNCTIONING OF THE UNBORN CHILD AT EIGHT WEEKS OF AGE POST CONCEPTION

20. The child at eight weeks is a clearly recognizable human being even to the human eye. The child's brain has formed (the child's brain continues to form following normal birth all through childhood and adolescence). An important fact is that at eight weeks the brain is producing a substance, "substance P", which is the "chemical messenger for pain".

21. The child at the embryonic stage of development has arms, legs, fingers and toes which are separate and distinct. The child has a nose and an external ear and, as Dr. Nathanson put it, the child "is, in fact,...quite obviously one of us".

22. The child, in every way, is a human being that is very small in physiological terms. The child functions the same way that an adult human being functions. The child at that age excretes urine, and its heart beats regularly as it had been since the age of three weeks following conception. The blood is

circulating and brain waves have been isolated and detected for children which are eight weeks following conception. The child essentially does everything that an adult human being does but on a smaller scale.

DEVELOPMENTS IN IMMUNOLOGY DEMONSTRATE THE CHILD IS ALWAYS, THROUGHOUT ITS DEVELOPMENT FROM THE DATE OF CONCEPTION, A SEPARATE AND DISTINCT PERSON FROM THE MOTHER.

23. The pre-born child is always a separate person from the child's mother. Circulations are always separate and they never mix. In fact, if they do mix it can be lethal to the baby and even to the mother. Although the relationship is symbiotic and an important one, the child is a separate and distinct person and is not a part of the mother. This relationship is clearly disclosed by developments in immunology. The white blood cells in the immune system of the mother are capable of recognizing and distinguishing the mother from its non-self, the child. That is the principle reason why the immune system does not kill the organs of the mother. The white blood cells actually recognize parts of the mother as being the same human body to which it is a part. It also distinguishes a body that is not part of itself. If a foreign substance is put into a person's body the white blood cells will

recognize it and immediately attack it in an "attempt to throw it out". The foreign body is not self. When the pregnancy progresses and the blastocyst implants, (when the child is eight or nine days old following conception), chemical messages are sent to various systems in the mother and the immune system (the white blood cells included) galvanizes because it recognizes that there is a foreign body within the mother. A concerted immune attack is focused on the new human being and the objective of the immune system is to expel the foreign body. Each one of us who were unborn babies have undergone this attack. The unborn baby erects a defense against the attack. The trophoblast which constructs the placenta serves as an immunological wall. Graphically it stops the attack. Most human beings survive the attack of the mother's immune system. Those which do not survive are expelled which is the phenomenon that is referred to as "spontaneous miscarriages". A spontaneous miscarriage involves a person who is unborn but fails to survive the attack by the mother's immune system.

ONLY AFTER 1984, ELEVEN YEARS AFTER ROE V. WADE, DID MEDICINE UNDERSTAND THAT THE ABORTION OF THE UNBORN CHILD EVEN AT THE EARLY STAGES OF LIFE WITHIN THE MOTHER'S WOMB (INCLUDING AN EIGHT WEEK

OLD CHILD) INVOLVES A BRUTAL, VIOLENT AND PAINFUL DEATH OF A HUMAN BEING.

24. Mainly as a result of information learned during abortions that were performed after the Supreme Court decision in Roe v. Wade, it is now clear that the abortion of an unborn child, even at the early stages of the child's life following conception, involves a brutal, violent and painful death of a human being. It was not until 1984 that members of the medical profession began to document the abortion experience. In that year, Dr. Bernard Nathanson commissioned a doctor who was performing a legal abortion at a clinic to perform the abortion under ultrasound with the modern technology then available. During one day's work the commissioned doctor taped the ultrasound abortions of twenty-five to thirty human beings. A vivid depiction of one of the abortions was incorporated into a film entitled "The Silent Scream". As a result of the use of this technology in the taping of the abortion it is documented that the unborn child is moving around in the womb in the embryonic fluid. We now know from this technology that the unborn child begins to move within the embryonic fluid at the age of eight weeks.

25. In the abortion process the doctor puts an instrument into the womb to dilate the cervix. The doctor breaks the water and the embryonic fluid is permitted to flow out. Then the doctor uses a suction apparatus into the uterus. On the film it can be seen that the baby moves away from the suction apparatus. After the baby moves from the apparatus, the suction is turned on and a tremendous negative force is used to pull the baby from its living quarters.

26. In the suctioning process, the arms and legs of the human being are being torn off and then subsequently the body is being ripped apart.

27. In this specific abortion filmed in 1984, the head of the baby was too large to be suctioned out so the doctor had to take a metal instrument called a polyp forcep to reach into the uterus to locate the baby's head and put the forcep around the baby's head and then close the forceps. The film reveals that the child's head is actually crushed in the process. It was not until 1984 that there was a reliable documentation of what actually occurs in abortion.

28. I performed or supervised seventy-five thousand abortions. These abortions were performed when this technology was not

available (before 1972). During an abortion a human being's life is terminated.

29. It is now clear that as a matter of fact, the abortion of an unborn child in its mother's womb subjects a human being to "unimaginable agony" and it ends the life of a person in the most barbaric and bloody manner possible.

30. The unborn child's death and the pain to which it is subjected is documented in the movie "The Silent Scream". In the film it can be seen that the mouth of the young unborn baby is open. It is a dramatic, an arresting moment - a heart stopping moment - because it can be detected that the child was grimacing and was evidencing the most unimaginable agony that one can envision.

31. I hereby certify that the foregoing statements made be me are true. I am aware that if the foregoing statements made be me are wilfully false, I am subject to punishment.

/s/ Bernard Nathanson
BERNARD NATHANSON, M.D.

DATED:

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J.M., individually and as guardian ad litem of his unborn unborn child Plaintiff, vs. V.C.; W.M.C.; JOSEPH BLOW AND RICHARD ROE, fictitious fictitious names of real individuals who are employees agents of the defendant corporation Defendants.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MONMOUTH COUNTY DOCKET NO. MON-C-66-92 CIVIL ACTION CERTIFICATION IN LIEU OF OATH OR AFFIDAVIT OF BERNARD NATHANSON, M.D.

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1. I am a doctor of medicine licensed to practice medicine in the State of New York. I am board certified in obstetrics and gynecology and I maintain my practice at 133 East 80th Street, New York, New York.

2. On April 13, 1991 I testified in the Municipal Court in Morristown, New Jersey, in the matter of State of New Jersey v. Alexander Loce, et al. The testimony in that case has been memorialized in a transcript. The portion of the transcript that contains my direct testimony is attached to this certification.

3. I incorporate by reference the testimony I gave in the matter of State v. Loce in this certification. I understand that this certification is being submitted in the New Jersey Courts in a law suit entitled J.M. v. V.C., W.M.C., et al., currently pending in the Superior Court of New Jersey, Chancery Division, before The Honorable Patrick J. McGann, J.S.C. I understand that this case is a civil action brought by the father of an unborn child seeking to enjoin an abortion. It is to be made part of the record on an Order to Show Cause and in Opposition to a Motion to Vacate the Restraints, and in support of an application for a permanent injunction.

4. I certify to Judge McGann and the New Jersey Courts that the testimony that I gave in the matter of State of New Jersey v. Alexander Loce, et al., which is attached to this certification, is truthful and accurate and I incorporate it by reference.

5. I hereby certify that the foregoing statements made be me are true. I am aware that if the foregoing statements made be me are wilfully false, I am subject to punishment.

/s/ Bernard Nathanson
BERNARD NATHANSON, M.D.

DATED:

BERNARD NATHANSON, M.D.

having been duly sworn according to law, testified as follows:

THE JUDGE: With respect to the speaking and movement in my courtroom, this is a court of law. It looks like someone's den with the fireplace, but it is a court of law.

I expect silence so we can hear the testimony, the direct examination and cross-examination.

All right, you may begin, counsel.

DIRECT EXAMINATION OF MR. TRAYNOR:

Q Doctor Nathanson, please state your full name and your address.

A Bernard N. Nathanson, M.D., 133 East 80th Street, New York, City.

Q And, Doctor, where are you licensed to practice medicine?

A In New York and Pennsylvania.

Q What is your educational background?

A I was educated at Cornell University. I then went to the McGill University Medical College in Montreal, Canada.

Q What degree did you receive from Cornell University?

A I did not receive a degree. It was pre-medical education. I received a degree of M.D. at McGill in 1949.

Q And did you do any post-graduate medical training?

A Yes I did. I had a year as a rotating intern at the Michael Reece Hospital in Chicago, a years as an assistant resident in surgery at the New York Hospital Cornell Medical Center; four years of residency in obstetrics and gynecology at the Woman's Hospital in New York City.

That residency was interrupted by two years of service in the U.S. Air Force, during which time I was chief of obstetrics and gynecology in the Northest Air Command.

And after this rather lengthy period of training and service, I entered the private practice of obstetrics and gynecology in New York City at the end of 1957, substantially older than I was when I started.

Q Doctor, what is your specialty?

A Obstetrics and gynecology.

Q Doctor, do you have a board certification?

A I do.

Q What is that?

A I was certified by the American Board of Obstetrics and Gynecology in April 1960.

Q Do you have any hospital affiliations?

A I do.

Q And those are?

A I am senior attending obstetrician and gynecologist at the Saint Vincent's Hospital Center which is part of the New York Medical College.

I am senior obstetrician and gynecologist at the St. Luke's Roosevelt Hospital, which is part of Columbia University College of Physicians and Surgeons.

I'm associate attending obstetrician and gynecologist at the New York Hospital Cornell Medical Center.

And I was chief of the obstetrical service at the St. Lukes' Hospital for a period of five, for or five years, from 1973 until the end of 1977.

Q Do you have any professional associations?

A I do.

I am a member of the American Medical Association, the New York State and County Medical Societies.

I am a fellow of the American College of Surgeons.

I am a fellow of the American College of Obstetricians and Gynecologists; and a very lengthy list of really quite minor, other organizations.

Q Have you published any writings in your field?

A Yes, I have.

Q Could you give us some of those?

A I published, I believe, 15 or 16 scientific articles, several books, and assorted other material in the area of bio-ethics especially.

Q Have you published in the area of fetal development and embryology and fetology?

A Yes, I have, and I have also lectured on this in respect to my academic appointments.

Q Have you received any awards or honors in your field?

A Well, yes. I have been appointed assistant or clinical assistant professor of obstetrics and gynecology at the Cornell University Medical College which I currently hold.

I also hold a professorship at the New York Medical College where I am clinical associate professor of obstetrics and gynecology.

So I have professorships at two universities.

MR. TRAYNOR: I offer the doctor as an expert witness in the field of obstetrics and gynecology.

THE JUDGE: Any objection?

MR. BANGIOLA: No objection.

THE JUDGE: All right, the doctor will be accepted as an expert in obstetrics and gynecology.

You may proceed.

BY MR. TRAYNOR:

Q Doctor, in addition to indicating your training in your chosen field, do you have any training in abortion procedures and any practice, any experience in that practice?

A Yes, I have -- and I say this immodestly, but I probably have more experience in the area of abortion and abortion technology than perhaps anyone in this country, owing to the fact that I was the director of the largest abortion clinic in the United States for a period of two years; and published early on in the medical literature, scientific papers on techniques of abortion, ambulatory abortion technology, complications of abortion, and a whole range of issues dealing with abortion and satellite issues.

Q Thank you, Doctor.

Doctor, would you describe the anatomy of the female reproductive system?

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J M , individually as guardian ad litem of his unborn child Plaintiff, vs. VC; WMC; JOSEPH BLOW RICHARD ROE, fictitious names of real individuals who are employees and agents of the defendant corporation Defendants.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MONMOUTH COUNTY DOCKET NO. CIVIL ACTION ORDER TO SHOW CAUSE WITH TEMPORARY RESTRAINTS

THIS MATTER having been opened to the Court by Cassidy, Foss & San Filippo, Harold J. Cassidy, Esq., appearing, and Patrick J. Mullaney, Esq., attorneys for the Plaintiff, and the Court having reviewed the Plaintiff's Verified Complaint, the Certifications, the sworn testimony presented, Plaintiff's Brief and the arguments of Plaintiff's counsel; and the Court having determined for good cause

showing that: (1) it clearly appears from the specific facts shown by the sworn testimony and the Verified Complaint that the Plaintiff is the unwed natural father of an unborn child; that the Defendant, V C is the unwed mother of that unborn child; that the Defendant has been pregnant for approximately eight weeks; that the Defendant V C intends to abort her pregnancy without the consent of the natural father on or about March 11, 1992; that the Plaintiff, the natural father opposes the abortion of the unborn child and wishes to raise and support the child; that the Plaintiff wishes to assert his rights as the natural parent of the child; that the Plaintiff, as the natural parent, wishes to assert the rights of the unborn child; and therefore, that immediate and irreparable harm will result to the Plaintiff; (2) Plaintiff has demonstrated a substantial likelihood of success on the merits; (3) Plaintiff has demonstrated that any harm to the Defendants resulting from the imposition of the temporary restraints requested by Plaintiff is outweighed by the harm which would result to the Plaintiff if such restraints were not imposed; and (4) the imposition of the temporary restraints against the Defendants does not contravene the public interest;

IT IS on this 7th day of March, 1992 at 3:35 P.M.

ORDERED that Plaintiff's application for a temporary restraining order shall be and hereby is granted as follows:

A. Defendant V C is hereby prohibited and enjoined from accepting or requesting any service, any surgical or medical procedure, ingesting drug or substance of any kind or taking any action which will directly or indirectly result in the abortion of her pregnancy or which will otherwise, directly or indirectly, result in the termination of her pregnancy;

B. Defendant WMC , Howell, New Jersey is hereby prohibited and enjoined from rendering any service, performing any surgical or medical procedure, dispensing any drug or substance of any kind or taking any action which will directly or indirectly result in the abortion of the pregnancy of V C or which will otherwise result, directly or indirectly, in the termination of the pregnancy of V C;

C. Each and every director, officer, employee, agent and/or representative of Defendant WMC , New Jersey is hereby prohibited and enjoined from rendering any service, performing any surgical or medical procedure, dispensing any drug or substance of any kind or taking any action which will directly or indirectly result in the abortion of the pregnancy of V C

or which will otherwise result, directly or indirectly, in the termination of the pregnancy of V C;

IT IS FURTHER ORDERED that on forty-eight (48) hours' notice to Plaintiff's counsel, Defendants may appear and move the dissolution or modification of this Order; and

IT IS FURTHER ORDERED that the restraints imposed by this Order shall expire on the 30th day of March 1992 at 4:00 P.M., unless extended by further order of this Court; and

IT IS FURTHER ORDERED that the defendants are enjoined from disclosing, directly or indirectly, the identity of the plaintiff, John Doe, and the true identity of Jane Roe, and Ordered to take all reasonably precautions to prevent an inadvertent disclosure of them; and

IT IS FURTHER ORDERED that V C is enjoined from leaving the State of New Jersey for the purpose of terminating the life of her unborn child; and

IT IS FURTHER ORDERED that the Defendants or their attorneys show cause before this Court at the Superior Court of New Jersey at the Monmouth County Court House in Freehold, New Jersey, on March 30, 1992, at 1:30 o'clock P.M., why an Order should not be entered:

A. Permanently prohibiting and enjoining Defendant VC from accepting or requesting any service, any surgical or medical procedure, ingesting drug or substance of any kind or taking any action which will directly or indirectly result in the abortion of her pregnancy or which will otherwise, directly or indirectly, result in the termination of her pregnancy;

B. Permanently prohibiting and enjoining Defendant WMC , New Jersey from rendering any service, performing any surgical or medical procedure, dispensing any drug or substance of any kind or taking any action which will directly or indirectly result in the abortion of the pregnancy of V C or which will otherwise result, directly or indirectly, in the termination of the pregnancy of V C;

C. Permanently prohibiting and enjoining each and every director, officer, employee, agent and/or representative of Defendant WMC , New Jersey from rendering any service, performing any surgical or medical procedure, dispensing any drug or substance of any kind or taking any action which will directly or indirectly result in the abortion of the pregnancy of V C or which will otherwise result, directly or indirectly, in the termination of the pregnancy of V C; and

IT IS FURTHER ORDERED that this order shall not be disclosed or revealed to anyone other than defendants counsel where the names of the parties are visible or revealed; and

IT IS FURTHER ORDERED that Defendants file an Answer to the Plaintiff's Complaint, and submit any briefs and/or certifications or affidavits in opposition to the above relief, not later than March 26, 1992,^ and that Plaintiff submit any reply briefs and/or certifications or affidavits not later than March 27, 1992 at 4:00 p.m.

at 4:00 p.m.

/s/ Patrick J. McGann, Jr.
J.S.C.

ORDER ON EMERGENT APPLICATION

JOHN DOE, a fictitious name of a real person, individually; JOHN DOE a fictitious name of a real person, guardian ad litem for his unborn infant child

vs.

JANE ROE, a fictitious name of a real person, et al.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.
MOTION NO.
BEFORE PART: E
JUDGES: SHEBELL
SKILLMAN
D'ANNUNZIO

EMERGENT APPLICATION FILED: March 13, 1992 BY: Cassidy, Foss & San Filippo AND Patrick J. Mullaney, Esq.

ANSWER(S) FILED: BY:
BY:

APPEARANCE ONLY: BY: Harold J. Cassidy, Esq.

DATE ARGUED: March 13, 1992

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 13th DAY OF MARCH, 1992, HEREBY ORDERED AS FOLLOWS:

EMERGENT APPLICATION FOR LEAVE TO APPEAL AND TO PROCEED WITH FICTITIOUS NAMES	GRANTED	DENIED	OTHER
	X		X

SUPPLEMENTAL: The parties to this action, their representatives, and the court shall use the initials of the parties and not their full names or other means of identity. The real names of the parties shall be maintained as a sealed record of the court. The order of the Chancery Division dated March 9,1992 is hereby summarily reversed.

FOR THE COURT:
/s/ Thomas F. Shebell, Jr.
THOMAS F. SHEBELL, JR., J.A.D.

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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MONMOUTH COUNTY
DOCKET NO. MON-C-66-92

J.M., individually and as guardian ad litem of his unborn unborn child
Plaintiff,

vs.

V.C.; W.M.C.; JOSEPH BLOW AND RICHARD ROE, fictitious fictitious names of real individuals who are employees agents of the defendant corporation

Defendants.

TRANSCRIPT OF

ORDER TO SHOW CAUSE

DATE: March 19, 1992
PLACE: Freehold, New Jersey

B E F O R E:

THE HONORABLE PATRICK J. McGANN JR., J.S.C.

APPEARANCES:

Harold J. Cassidy, Esq. (Cassidy, Foss & San Filippo) and
Patrick J. Mullaney, Esq.
Attorneys for the Plaintiff J.M.

Lewis H. Robertson, Esq. (Evans, Osborne & Kreizman)
Attorneys for the Defendant V.C.

JAMES V. OVERBY, C.S.R.
OFFICIAL COURT REPORTER
MONMOUTH COUNTY COURT

HOUSE

FREEHOLD, N.J. 07728
LICENSE #XI00692

3
Line 10 to 21

The motion addressed to J.M. individually we'll hear argument on. I am frank to say I think that probably has some merit to it. He may not having standing individually maintaining the action simply because he's the biological father.

The argument that's going to be made on behalf of the unborn child is essentially that times have changed since Roe against Wade. That the issue which Roe against Wade passed up on the grounds that the Supreme Court at that time was not in a position to make a definitive ruling on life, you know, when it begins and things like that.

* * *

6
Line 21 to 23

Having said that, I think I will stop and then I'd like to address first of all the question which I said was somewhat tenuous of the standing of J.M. individually.

* * *

7
Line 13 to 22

MR. CASSIDY: Judge, this aspect of the case really presents a question of first impression in this jurisdiction for sure and probably in this country post Webster.

THE COURT: An issue as to his standing.

MR. CASSIDY: As to whether he has constitutional rights that are implicated.

THE COURT: You say it your way. I say it my way. How he's got standing as a busy body, somebody might say except he happens to be the biological father.

* * *

8
Line 16 to 17

THE COURT: The question is now does he have standing to say to her don't abort that child.

* * *

13
Line 18 to 22

THE COURT: I'll rule on that because I want it out of the way. The companionship argument has no basis at all in fact here. The

genetic relationship has no basis at all for standing. Now, go onto whatever other grounds you have.

* * *

15
Line 10 to 15

THE COURT: We're not there, the same argument as companionship. We're not there. There is no child that anybody is responsible to pay for or to hug.

MR. CASSIDY: Except I think that if we were to address the issue that way, we're avoiding the question of fact, this is a human being.

* * *

17
Line 5 to 10

THE COURT: But that again is a circular argument because it assumes he's defending life and we're not at that point yet.

MR. CASSIDY: If there is a question of fact on this record, I think that the record is clear that this is a human being.

* * *

Line 15 to p. 22 Line 7

MR. ROBERTSON: I'll be very brief and very summary. First of all, of course we're in a trial court bound by applicable precedent.

Secondly, it's dangerous to divorce holdings from their facts because the facts give rise to the policies that were considered in order to lead to the holdings and all the cases that were cited for the proposition that the father has a right because of companionship, his right of procreation, his right to discharge his duty to his child and perhaps an Article I right.

The courts were dealing with a personal being and here there is no personal being. And I think that a totally different consideration would operate were a court in proper circumstances to analyze the father's standing.

I suggest that thee has been no case cited in any jurisdiction at least in an appellate court where a father in circumstances such as these has ever been held to have standing.

And for those reasons again, in summary fashion, the father has no standing.

THE COURT: I'll grant the motion to dismiss J.M. as a party plaintiff and I'm satisfied that that's the proper thing to do. All of the cases in which the issue has arisen in the past have been husband type cases and those cases, of course, have an additional element to them and that is, in a sense the contractual agreement between husband and wife in which we're partners in this whole idea of marriage, whole idea of procreation and because I'm your partner, I have something to say about what occurs during our marriage.

Even in those cases, husbands have not be afforded standing. This is one step removed from that and aside form the genetic connection and aside from the fact he's interested as a person because of the relationship that he had with the person who now bears the unborn, that's not any sort of a constitutional basis.

The constitutional rights alleged in his behalf or as Mr. Robertson says, rights that courts have talked about in connection with children who are available, my expression, for hugging. That's the context in which those cases went forward and not in this context at all.

So I will grant the motion to dismiss J.M. as an individual plaintiff.

42
Line 7 to p 56 Line 15

THE COURT: It seems to me that the judicial resolution aside from all of the arguments is the resolution that should be designated on the return date of an order to show cause as to whether or not certain temporary restraints should be continued as an injunctive order.

The injunctive order is effectively to V.C. don't abort that, I'll say fetus because that's a neutral term. Should that injunction continue to remain in place.

That depends on whether or not we have a lawsuit because if I do not appoint a guardian ad litem or say to J.M. that while you designate yourself guardian ad litem of the unborn, that's not real.

If I don't do that, then we have no case and if we have no case we have no injunction. It's true that the U.S. Supreme Court has not ruled on the issue at least in Roe v. Wade, it doesn't.

It specifically left the field open. It decided not to get involved in the field and the language that it used, maybe it's

language that now some nineteen years later, it's easier to question it but when you read the language, it doesn't sound terribly judicial.

"We need not resolve the difficult question of when life begins." Well, if you say that, then you never get into the question of personhood and you never get into the question of constitutional protection.

Whatever life is there in V.C., right there, if it is life, whatever is there in V.C. if the normal nine month term comes to pass and if there is no abortion involved, voluntary abortion in the meanwhile, miscarriage, a baby will be born, male or female and get a name.

And from then on be known as Mary Jones. We don't apply the name Mary Jones to what is becoming Mary Jones, we say only when the birth process take place, only when he slaps the baby's bottom, cut the umbilical cord, then Mary Jones is okay.

Arguments that are presented by way of the affidavit submitted by Drs. LeJeune and Nathanson say that it's Mary Jones right from the moment of conception. It doesn't have a name; but from the time of birth it's going to be Mary Jones from the time it

dies and birth is just one intervening step almost like going to high school, maybe, during lifetime. It's a step along the way of life.

Now, that's what they say. And on a reading by an unlettered person in the medical field such as myself and I'm not deprecating, that's the truth, on the reading what they say and according to their expertise which I don't have, they say life is life.

That it begins the moment of conception and goes on until death is declared. Now, we have spent a great deal of time in figuring out when people are dead. We find that the legislature passes an act which defines when death occurs.

The legislature hasn't passed an act defining when life occurs. But the fact that we address the problem, legislature having on one end a lot of court cases which had to do with defining when death occurred too where the legislature acted, which is not something unusual that courts have to act first.

But we have spend a lot of time on that, w in this state, and I think most states do claim we are protective of life and we are. I think in the cases with the children in the hospital, children of Jehovah's witnesses, child need blood transfusion, simple thing.

Parents say no, we can't do that, against our religion. The courts say you keep your religious beliefs, we're interested in the child's rights. Child gets a transfusion.

There are cases which have said, for example, where a mother is still carrying he infant in her womb, refuse medical treatment which will be deleterious to the child in the wound, there are orders that have been entered that say you've got to take that treatment even if it's against your religious beliefs because it affects the unborn. And we're there to preserve life.

The entire argument, and it's an excruciating argument over the death penalty and is an argument in favor of life. The reason the Supreme Court is going through all of the gyrations, and I don't have any quarrel with what they are doing, because they say we don't want to be the cause of somebody's death because we support life. That's the principle.

So with all of that and with the affidavit in front of me, the I fall back to those guiding principles which have to do with injunctive orders issued by judges at the outset of litigation.

And I've said here on the record many times, the first principle for any judge who is asked to put an injunction in place at the outset of litigation, the first principle is don't do it. That's

first. Because you haven't had a compete hearing and an injunctive relief usually is plenary relief.

At the end of the case somebody wins and somebody loses. And the judge says you're enjoined from doing that permanently. You're finished. That is the general principle; but there are exceptions and the exceptions are very clear and the principles are well known.

If you have to enjoin in the beginning of a case, do so only to prevent immediate and irreparable harm and injury. Now, you say as far as the unborn, that's in the womb of V.C. if I don't enjoin there will never be a possibility of birth and there will never be a possibility of personhood beyond the birth period as the constitution would protect.

So harm in the sense of the unborn is irreparable. Now, maybe the process of nature will mean that that child will never be born. Maybe there will be a miscarriage some place along the line. That's something we're not talking about. We're talking about doing something affirmative and active to prevent a natural development.

The questions is, is that a development of life and the affidavit say positively if it's so, if what Dr. LeJeune says is so,

then at the moment of conception all of the full blown characteristics of that individual when the individual is ultimately born and grows and comes to the peak of its abilities, physical abilities, all of that is decided at the very moment of conception.

His analysis of DNA and comparison of the tapes and signals and things like that is fascinating and maybe a complete hoax on his part. Other people may not agree with it but it really is very interesting thing to read.

And he says that's when it starts and the whole future is predicted except if it's hit by a bus or gets killed, there is an accident or falls off a cliff.

But the whole process of mental growth, the facial features, the color of hair, all of that is right there in that moment of conception. If you say that and if it is so, then you say to yourself there is something protectable there. At least whatever is there should have a right to a hearing to determine whether it is life.

Whether LeJeune is right or wrong, whether Nathanson is right or wrong, but with those affidavits it looks like if I go have the abortion, irreparable harm as to whatever is there.

So the first standard is met, so to speak, for our purposes today. The second is a standard even if there is perceptible irreparable harm don't do it, judge, unless you find there is a probability of ultimate success.

Now in the ordinary run of the mill chancery cases, I have said that calls upon the chancery judge to exercise an educated hunch as to what is likely to occur. And the exercise of that judgment, that discretion is left to a veteran chancery judge y appellate courts.

And they say he's had experience along the line. He has a feel for cases like this; and, therefore we'll leave the first decision up to that judge, him or her to decide whether he thinks or she thinks there is a possibility of ultimate success.

It involves some judicial crystal ball gazing but against the background of experience and a knowledge of people perhaps and a knowledge of the law.

So I do it and every other chancery judge does it, hunching through to a probability of ultimate success. In some cases it's clear. In other cases it's not clear. And in those cases injunctions are granted.

In some cases it's clear there will never be a probability of ultimate success so don't grant the injunction. And then the third standard if you find the first two exists, then still before you impose the injunction, sit back and thing of the consequences of what you do.

What happens to the one person if you impose the injunctive order. What happens to the other one. And I use person now just in a legal since, not definitive here. What happens to the other person if you don't' impose the injunctive order.

Those opinions and those principles apply here. So the irreparable harm arguably is there and on the papers before me certainly is there because they say from moment of conception all the way along. So irreparable harm to what is there, I think, is quite clear.

Now, the probability of ultimate success. That's a mixed question. It's a mixed question of fact and law because I keep saying what is there. I keep saying based upon what is before me and that's a one-sided presentation, I recognize.

Now are there equally qualified experts who will come in and say LeJeune is wrong. Nathanson is wrong. That's not the

way it works. That's not the biology of it. What's the word I'm looking for, the embryology of it.

I think that LeJeune is an embryologist. And I will have to listen and say LeJeune looks pretty good on paper. When he comes here, he doesn't turn out to be so hot or Nathanson looks pretty good on paper, but when he comes to testify, he doesn't stand up against the others who are more qualified, more expert and more involved in deciding this business of when does life begin.

But I do know that the U.S. Supreme Court has never done that. I do know that the New Jersey Supreme Court has never done that. Neither of those courts has had a record which is made in a trial court in a judicial fashion in which the judge evaluates qualifications.

A judge evaluates the worth of testimony and a judge makes a call one way or the other. The judge can't sit and say we need not resolve the difficult question of when life begins. A trial Judge can't do that. The issue is there. The trial judge has to one way or the other resolved it. He could back off the field and say gee, I don't know fellows.

That's what trial judges are. So our Supreme Court in Right to Choose v. Byrne states at page 299 of the opinion in 91 N.J. Reports, "We do not presume to answer the profound questions about the morale, medical and societal implications of abortions nor do we undertake to determine when life begins or at what point fetus is a person."

They backed off because there was no factual record at all before them. That was the question of funding abortions and there was no record before them at all as to whether the question of when life begins or when a fetus becomes a person but that record had to be made. It can't be made unless there is a litigated case.

Now, in this case the question is, is there a probability of ultimate success and I am frank to say I don't know the answer to that.

The unborn has to prove, through its guardian ad litem, that it has life. It has to prove, through its guardian ad litem, at what point a court can say that life is equated with a person because there may be a difference between the two, I don't know.

But the irreparable harm is so overwhelming if the fetus is ultimately able to say yes there is life or the court can say yes

there is a life, yes there is a person, to say I'll never give it chance by allowing the abortion means the issue can never be reached and the answer can never be given and then reviewed by an appellate court one way or the other.

So if I don't we owe it to the unborn here, I owe it to people who constantly ask this question to start and make a record and to start the process where somewhere, some day the definitive answer may be given.

So for that reason even though the probability of ultimate success is either way, the scales are balanced, if you wish, the irreparability of the harm is so strong. And then we get to the balancing issue.

Now, I'm not passing over that quickly because during the time we're making a nice record here that fetus is growing in V.C. And she may be getting more anxious and it maybe creating medical difficulties. You know, I am aware to that possibility too and certainly an application is always open to come back to me and say you know release the injunction because we got a problem here.

An argument can be made when we get back here to the hearing and we'll talk about when he get back here, an argument

can be made when we get back here, judge, at some point in time no matter how nice the question is and how interested in all the lawyers and folks are that we're talking about, V.C. we've got look at her and her interests too and she does have interests.

So for our purpose today I will continue the injunctive order which I previously entered as a temporary restraint and I think, as I've said, there is a basis for doing that. That was never don in Roe v. Wade.

There was never a guardian ad litem. Keep coming back to the point where nobody has ever really made the record. There is also the argument that has been touched upon in the briefs and that is the question or personhood and when the label sticks so that it becomes constitutional and protectable is something that may vary between the U.S. Constitution and the New Jersey Constitution.

You know our courts have said many times that while we all give deference to the United States Constitution because it is the law of the land, there is no prohibition in that constitution from the states acting under their constitution giving it more expanded rights perhaps than the U.S. Constitution and our state has not been slow to do that either. So there is that argument.

So that I am willing to undertake the fact finding issue as to the -- what I don't know, that is what is life, when life begins and the legal issue that turns upon those facts as to when personhood arguably attaches so that constitutional rights are created.

But at the very least when we talk about the unborn, we can talk about a potential life and we can talk about a potential person because unless the process is interrupted that's what would happen.

So that potentiality is protectable by the injunctive order until we can determine whether we can drop, as I've said, the adjective or not.

So we'll continue the injunctive order. Now, the big thing is keeping V.C. in mind, when can we have a factual hearing and we need an answer on behalf of V.C.

MR. ROBERTSON: I understand.

THE COURT: And I can take it -- may I just digress. The clinic which is restrained doesn't appear because they say whatever the Judge says we'll do.

MR. CASSIDY: The lawyers for the clinic advised me that thy have no intention of appearing because they are only being

restrained with respect to this one particular individual and so they have know intention of being heard. They'll not file an Answer.

THE COURT: They'll do whatever the judge says.

MR. CASSIDY: Of course, we would want the injunction against them.

THE COURT: And to continue and I will for that purpose.

MR. CASSIDY: In fact -- no, I want to ask for them --

THE COURT: Leave it the way it is because that's sufficient. But timing?

MR. ROBERTSON: Your Honor, I'm in somewhat of an unusual position. I served in a sense as a first line of defense for V.C. and although I may participate in emergent application to the appellate division from this court's order today, that probably will be the extent of my participation. I'll be substituted by other counsel and --

THE COURT: You'll have to rally the troops kind of.

MR. ROBERTSON: So to speak. And I would ask I be allowed to defer giving the court an answer as to when an answer can be filed and when a hearing can be held.

I will put other counsel in contact with Mr. Cassidy as well as the court as soon as I can.

THE COURT: I recognize Mr. Cassidy has backing for his position and I'm sure that V.C. will have backing for her position now that people know it's going to be a fact finding hearing.

MR. ROBERTSON: I'm sure that will be the case.

THE COURT: All right, prepare the order any way so I can sign it and the interlocutory appeal can go forward.

MR. CASSIDY: Should we at least set a conference date so we can talk about streamlining the hearing?

THE COURT: I have to confer with the somebody. I hear it said Mr. Robertson will now be contacting the somebody and letting us know as soon as you can who the lawyer to whom we're supposed to direct --

MR. ROBERTSON: Your Honor, I did submit a form of order with my notice of motion and I phrased it such it would be used either grant or deny the relief question. I'd like to leave with a copy of the filed Order.

THE COURT: I can enter it.

MR. CASSIDY: While your Honor is at it, may I ask your Honor to certify the portion of Your Honor's ruling that was adverse to my client. Could you certify that interlocutory order is final.

THE COURT: Why don't you just cross appeal. There is a notice of appeal from this order and then cross appeal as to that. Certifying things as final gets trial judges into big trouble with appellate judges sometimes. So I would much rather you simply cross appeal.

Only thing that's not covered in the order is that which Mr. Cassidy would like to cross appeal on and that is the dismissal of J. M. as an individual party. Why don't you give me an order.

MR. CASSIDY: Is it possible for you to just write plaintiff individually dismissed so that we have one order to deal with? I would appreciate it, Judge.

THE COURT: Further ordered the plaintiff's complaint shall not be dismissed, however, J.M. as an individual does not have standing to prosecute the action. Good enough?

- CERTIFICATE -

I, JAMES W. OVERBY, do hereby certify that the foregoing is a true and accurate transcript of the within proceeding, as taken by me stenographically on the date and place hereinbefore set forth.

/s/ James W. Overby
JAMES W. OVERBY, C.S.R.
Official Court Reporter

DATE: March 23, 1992

EVANS, OSBORNE & KREIZMAN
180 White Road
Little Silver, NJ 07739
(908) 741-9550
Attorneys for Defendant V.C.
pl\vc.2

J.M., individually and as guardian ad litem of his unborn unborn child Plaintiff, vs. V.C.; W.M.C.; JOSEPH BLOW AND RICHARD ROE, fictitious fictitious names of real individuals who are employees agents of the defendant corporation Defendants.	:	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MONMOUTH COUNTY DOCKET NO. MON-C-66-92 CIVIL ACTION - ORDER

This matter having been opened to the Court by Evans, Osborne & Kreizman, attorneys for Defendant V.C., Lewis H. Robertson, Esq. appearing, on notice to Cassidy, Foss & San Filippo, attorneys for Plaintiff J.M., Harold J. Cassidy, Esq. appearing, and the Court having considered the moving papers and

any response and reply thereto and argument of counsel, and it appearing to the Court that certain relief is warranted; it is on this 19th day of March, 1992,

ORDERED that the restraints heretofore entered by this Court's Order of March 9, 1992, shall be and are herewith continued; and it is further

ORDERED that the Plaintiff's Complaint shall not be dismissed however, J.M. as an individual does not have standing to prosecute the action.

/s/ Patrick J. McGann, Jr.
PATRICK J. MCGANN, J.S.C., P.J.Ch.

ORDER ON EMERGENT APPLICATION

J.M., Individually and as guardian ad litem of his unborn child,

Plaintiff-Respondent, Cross-Appellant,

vs.

V.C., a fictitious name of a real individual; W.M.C., a fictitious name of a real corporation; JOSEPH BLOW and RICHARD ROE, fictitious names of real individuals who are employees and agents of defendant corporation

Defendant-Appellants, Cross-Respondents

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. AM-742-91T5
MOTION NO. M-3884-91
M-3886-91
BEFORE PART: E
JUDGES: SHEBELL
SKILLMAN
D'ANNUNZIO

EMERGENT APPLICATION FILED: 3/20/92 BY: Lewis H. Robertson (Evans, Osborne & Kreizman) for defendant)

ANSWER(S) FILED: BY: Harold J. Cassidy (Cassidy, Foss & San Filippo) and Patrick J. Mullaney for Plaintiff

BY:

APPEARANCE ONLY: BY:

DATE ARGUED: 3/23/92

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 23rd DAY OF MARCH, 1992, HEREBY ORDERED AS FOLLOWS:

EMERGENT APPLICATION FOR LEAVE TO APPEAL FROM TRIAL COURT'S ORDER OF MARCH 19, 1992 CONTINUING

RESTRAINTS HERETOFORE ENTERED AND DENYING DEFENDANTS' APPLICATION FOR DISMISSAL OF COMPLAINT	GRANTED	DENIED	OTHER
	X	X	X

SUPPLEMENTAL:

We grant the motion of defendant, V.C., for leave to appeal solely with respect to the part of the trial court's order of March 19, 1992, which continues the restraints contained in the trial court's order signed on March 7, 1992 and entered on March 9, 1992. Pursuant to R. 2:11-2, we elect to consider the merits of the appeal. We summarily reverse the part of the trial court's order of March 19, 1992 continuing restraints and vacate paragraphs (A), (B) and (C) of the court's order of March 7, 1992 as well as the further paragraph of that order which prohibits V.C. from leaving the State of New Jersey for the purpose of terminating her pregnancy. We are satisfied that the restraints granted by the trial court are clearly unjustified in view of Roe v. Wade, 410 U.S. 113, 35 L.Ed. 2d 147 (1973), Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 49 L.Ed. 2d 788 (1976) and Right to Choose v. Byrne, 91 N.J. 287 (1982).

Plaintiff having represented to this court that he would make an immediate application for emergent relief to the Supreme Court of New Jersey if the restraints granted by the trial court were dissolved and having requested a brief stay of the dissolution of the restraints issued by the trial court until 4 p.m. on March 24, 1992.

We deny defendant's motion for leave to appeal from the part of the trial court's order denying her motion to dismiss the complaint.

Except for the part of this order which denies defendant's motion for leave to appeal from the trial court's denial of her motion to dismiss the complaint, Judge Shebell dissents for the reasons expressed in his attached opinion.

FOR THE COURT:
/s/ Stephen Skillman
STEPHEN SKILLMAN, J.A.D.

ORDER ON EMERGENT APPLICATION

J.M., Individually and as guardian ad litem of his unborn child,

Plaintiff-Respondent, Cross-Appellant,

vs.

V.C., a fictitious name of a real individual; W.M.C., a fictitious name of a real corporation; JOSEPH BLOW and RICHARD ROE, fictitious names of real individuals who are employees and agents of defendant corporation

Defendant-Appellants, Cross-Respondents

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. AM-742-91T5
MOTION NO. M-3884-91
M-3886-91
BEFORE PART: E
JUDGES: SHEBELL
SKILLMAN
D'ANNUNZIO

EMERGENT APPLICATION FILED: 3/20/92 BY: Lewis H. Robertson (Evans, Osborne & Kreizman) for defendant)

ANSWER(S) FILED: BY: Harold J. Cassidy (Cassidy, Foss & San Filippo) and Patrick J. Mullaney for Plaintiff

BY:

APPEARANCE ONLY: BY:

DATE ARGUED: 3/23/92

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 23rd DAY OF MARCH, 1992, HEREBY ORDERED AS FOLLOWS:

EMERGENT APPLICATION FOR LEAVE TO CROSS APPEAL FROM THAT PORTION OF THE COURT'S ORDER OF MARCH 19, 1992

WHICH DISMISSES PLAINTIFF'S COMPLAINT BROUGHT IN HIS INDIVIDUAL CAPACITY	GRANTED	DENIED	OTHER
		X	

SUPPLEMENTAL:

Judge Shebell dissents from this order for the reasons expressed in his attached opinion.

FOR THE COURT:

/s/ Stephen Skillman
STEPHEN SKILLMAN, J.A.D.

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
AM-742-91T5
M-3884-91
M-3886-91

J.M., Individually and as guardian ad litem of his unborn child,

Plaintiff-Respondent,
Cross-Appellant,

vs.

V.C., a fictitious name of a real individual; W.M.C., a fictitious name of a real corporation; JOSEPH BLOW and RICHARD ROE, fictitious names of real individuals who are employees and agents of defendant corporation

Defendant-Appellants,
Cross-Respondents

SHEBELL, J.A.D., dissenting.

I cannot agree with the majority that emergent relief is appropriate and that the restraints imposed by the trial judge should be removed. The law pertaining to abortion is in a state of flux. See Webster v. Reproductive Health Servs., 492 U.S. 490, 106 L.Ed.2d 410 (1989); Planned Parenthood of S.E. Pa. v. Casey,

947 F.2d 682, 695, 698 (3d Cir. 1991). The United States Supreme Court's holding in Roe v. Wade, 410 U.S. 113, 35 L. Ed.2d 147 (1973) in the view of many represents an erroneous interpretation of the Constitution-inventing a constitutional right to an abortion, now exclusively in the mother, where none previously existed or could even have been contemplated by our founding fathers.

This court should not at this time rush to judgment. In this case, one of the recognized parents cries out for the right to "preserve" and thereafter "nurture" the child which the other seeks to irretrievably put beyond the reach of all courts. Cf. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 49 L.Ed.2d 788 (1976).

The courts or our Legislature, if given the opportunity, perhaps even because of this very case, may recognize an unborn child's right to life, or at least, the right of both parents to be heard on the issue. I would, therefore, continue the restraints wisely imposed by the trial judge. There is no other way the issue can be preserved in this case. Should the action of any court be less than to protect the subject matter of the controversy presented to it?

Further, I would grant leave on the cross-appeal of the natural father individually, and I would summarily reverse and remand so that all of the relevant issues may be reviewed on a complete record.

SUPREME COURT OF NEW JERSEY
M-960/970/971 September Term 1990

J.M., Individually and as
guardian ad litem of his
unborn child,

Plaintiff-Respondent,

v.

V.C., a fictitious name of a real
individual;

Defendant-Movant,

and

W.M.C., a fictitious
name of a real corporation;
JOSEPH BLOW and RICHARD ROE,
et al.,

Defendants.

This matter having been duly presented to the Court, and the Court having determined that plaintiff has failed to demonstrate a reasonable likelihood of prevailing on the merits of his complaint, and the Court having concluded that under current law, plaintiff's proffer of proofs would not realistically assist or inform the court in its determination of the legal issues properly before it;

And good cause appearing;

It is ORDERED that the motion for leave to appeal the denial of defendant's application to dismiss the complaint of J.M. as guardian ad litem (M-969) is granted; and it is further

ORDERED that leave to appeal having been granted, the motion for a summary reversal of the trial court's order (M-970) is granted, and the complaint is dismissed; and it is further

ORDERED that the motion to vacate the temporary stay of the Appellate Division(M-971) is granted.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 24th day of March, 1992.

/s/ Stephen Townsend
CLERK OF THE SUPREME COURT

SUPREME COURT OF NEW JERSEY
M-961/2/3/5/6/7/8 September Term 1990

J.M., Individually and as guardian ad litem of his unborn child,

Plaintiff-Respondent,

v. ORDER

V.C., a fictitious name of a real individual; W.M.C., a fictitious name of a real corporation; JOSEPH BLOW and RICHARD ROE, et al.,

Defendants-Respondents

This matter having been duly presented to the Court, and the Court having determined that plaintiff has failed to demonstrate a reasonable likelihood of prevailing on the merits of his complaint,

And good cause appearing;

It is ORDERED that the motion for leave to appeal the dissolution of restraints by the Appellate Division (M-961) is denied; and it is further

ORDERED that the motion for summary reversal on the issue of restraints (M-962) is dismissed as moot; and it is further

ORDERED that the motion for a stay (M-963) is denied; and it is further

ORDERED that the motion for leave to appeal the dismissal of the complaint of plaintiff as an individual (M-965) is denied; and it is further

ORDERED that the motion for summary reversal of the order of partial dismissal by the trial court (M-966) id dismissed as moot; and it is further

ORDERED that the motion for leave to file an overlength brief (M-967) is granted; and it is further

ORDERED that the motion to strike affidavits submitted by defendant (M-968) is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 24th day of March, 1992.

/s/ Stephen Townsend
CLERK OF THE SUPREME COURT

SUPREME COURT OF NEW JERSEY
M-988/989 September Term 1990
35,000

J.M., etc.,

Plaintiff-Movant,

v.

CORRECTED
ORDER

V.C., et al.,

Defendants-Respondents

This matter having been duly presented to the Court, it is ORDERED that the motion for leave to file a supplemental brief (M-988) is denied; and it is further

ORDERED that the motion for reconsideration (M-989) is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 24th day of March, 1992.

/s/ Stephen Townsend
CLERK OF THE SUPREME COURT

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER,
Clerk of the Court

Area Code 202
479-3011

March 25, 1992

Mr. Harold J. Cassidy
Cassidy, Foss & San Filippo
225 Broad Street, PO Box 896
Red Bank, NJ 07701-0896

RE: J.M.,
v. V.C., et al.
Application No. A-713

Dear Mr. Cassidy:

The application for a stay in the above-entitled case has been presented to Justice Souter, who on March 25, 1992 endorsed thereon the following:

"Denied
DH Souter
25 March 1992"

Very truly yours,

WILLIAM K. SUTER, Clerk

By
/s/ Francis J. Lorson
Francis J. Lorson
Chief Deputy Clerk

NOTE - FOR YOUR INFORMATION: A copy of this letter has been sent to all interested parties shown on the attached notification list.

A-183

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER,
Clerk of the Court

Area Code 202
479-3011

March 25, 1992

Mr. Harold J. Cassidy
Cassidy, Foss & San Filippo
225 Broad Street, PO Box 896
Red Bank, NJ 07701-0896

RE: J.M.,
v. V.C., et al.
Application No. A-713

Dear Mr. Cassidy:

The application for a stay in the above-entitled case has been presented to Justice Thomas, who on March 25, 1992 endorsed thereon the following:

"3/25/92
Denied
Clarence Thomas"

Very truly yours,

WILLIAM K. SUTER, Clerk

By
/s/ Francis J. Lorson
Francis J. Lorson
Chief Deputy Clerk

NOTE - FOR YOUR INFORMATION: A copy of this letter has been sent to all interested parties shown on the attached notification list.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

October 5, 1992

Mr. Harold J. Cassidy
225 Broad Street
P.O. Box 896
Red Bank, NJ 07701

Re: J.M.
v. V.C.
No. 91-2034
J.M., Guardian ad Litem of his unborn child
v. V.C.
No. 91-2040

Dear Mr. Cassidy:

The Court today entered the following order in each of the above entitled cases:

The petition for a writ of certiorari is denied.

Very truly yours,

William K. Suter, Clerk

A-185

ORDER ON MOTION

J.M., Individually and as guardian ad litem of his unborn child,
v.
V.C., W.M.C., JOSEPH BLOW and RICHARD ROE, fictitious names of real individuals who are employees and agents of the defendant corporation,

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4772-91t5
MOTION NO. M-6599-91
BEFORE PART: A
JUDGE(S): ANTELL
DREIR
VILLANUEVA, t/a

MOTION FILED: AUGUST 3, 1992
ANSWER(S) FILED: BY:
BY:
BY:
BY:
ADMITED TO COURT: SEPTEMBER 14, 1992

O R D E R

THIS MATTER HAVE BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 16 DAY OF SEPTEMBER, 199 2, HEREBY ORDER AS FOLLOWS:

MOTION BY XXXXXXX/RESPONDENT V.C., FOR SUMMARY DISPOSITION

GRANTED	DENIED	OTHER
X		X

SUPPLEMENTAL: The motion for summary disposition is granted and the determination presented for review is summarily affirmed.

FOR THE COURT:
/s/ Melvin P. Antell
MELVIN P. ANTELL P.J.A.D.

Monmouth County
C-66-92

ORDER ON MOTION

J.M., Individually and as guardian ad litem of his unborn child,
v.
V.C., W.M.C., JOSEPH BLOW and RICHARD ROE, fictitious names of real individuals who are employees and agents of the defendant corporation,

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4772-91t5
MOTION NO. M-6599-91
BEFORE PART: A
JUDGE(S): ANTELL
DREIR
VILLANUEVA, t/a

MOTION FILED: AUGUST 21, 1992
ANSWER(S) FILED: SEPTEMBER 1, 1992 BY: V.C.
BY:
BY:
BY:
ADMITED TO COURT: SEPTEMBER 14, 1992

O R D E R

THIS MATTER HAVE BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 16 DAY OF SEPTEMBER, 199 2, HEREBY ORDER AS FOLLOWS:

MOTION BY APPELLANT/XXXXXXXXX
J.M., TO FILE ANSWER TO MOTION FOR SUMMARY DISPOSITION NUNC RPO TUNC, TO SUPPLEMENT THE RECORD AND TO ACCERLATE DISPOSITION

GRANTED	DENIED	OTHER
X		

SUPPLEMENTAL:

FOR THE COURT:

/s/ Melvin P. Antell
MELVIN P. ANTELL P.J.A.D.

Monmouth County
C-66-92

National Sanctity of Human Life Day, 1988

By the President of the United States of America

A Proclamation

America has given a great gift to the world, a gift that drew upon the accumulated wisdom derived from centuries of experiments in self-government, a gift that has irrevocably changed humanity's future. Our gift is twofold; the declaration, as a cardinal principle of all just law, of the God-given, unalienable rights possessed by every human being; and the example of our determination to secure those rights and to defend them by every human being; and the example of our determination to secure those rights and to defend them against every challenge through the generations. Our declaration and defense of our rights have made us and kep us free and have sent a tide of hope and inspiration around the globe.

One of those unalienable rights, as the Declaration of Independence affirms so elequoently, is the right to life. In the 15 years since the Supreme Court's decision in *Roe v. Wade*, however, America's unborn have been denied their right to life. Among the tragic and unspeakable resultsin the past decade and a half have been the loss of life of 22 million infants before birth: the pressure and anguish of countless women and girls who are driven to abortion; and a cheapening of our respect for the human person and the sanctity of human life.

We are told that we may not interfere with abortion. We are told that we may not "impose our morality" on those who wish to allow or participate in the taking of the life of infants before birth: yet no one calls it "imposing morality" to prohibit the taking of life after people are born. We are told as well that there exists a "right" to end the lives of unborn children: yet no one can explain how such a right can exist in stark contradiction of each person's fundamental right to life.

That right to life belongs equally to babies in the womb, babies born handicapped, and the elderly or infirm. That we have killed the unborn for 16 years does not nullify this right, nor could any number of killings ever do so. The unalienable right to life is found not only in the Declaration of Independence but also in the Constitution that every President is sworn to preserve, protect and defend. Both the Fifth and Fourteenth Amendments guarantee that no person shall be deprived of life wihtout due process of law.

All medical and scientific evidence increasingly affirms that children before birtth share all the basic attributes of human personality - that they in fact are persons. Modern medicine treats unborn children as patients. Yet, as the Supreme Court itself has noted, the decision in *Roe v. Wade* reacted upon an earlier state of medical technology. The law of the land in 1988 should recognize all of the medical evidence.

Our Nation cannot continue down the path of abortion so radically at odds with our history, our heritage, and our concepts of justice. This sacred legacy, and the well-being and the future of our country, demand that protection of the innocents must be guaranteed and the the personhood of the unborn be declared and defended throughout oru land. In legislation introducted, at any request in teh First Session of the 1200th Congress, Ihave asked the Legislative branch to declare the "humanity of the unborn child and the compelling interest of the several states to protect the life of each person before birth." This duty to declare on so fundamental a matter falls to the Executive as well. By this Proclamation I hereby do so.

NOW, THEREFORE, I, RONALD REAGAN, President of the United States of America, by vitue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim and declare the unalienable personhood of eveyr American, from the moment of conception until nature death and I do proclaim, ordain, and declare that I will take care that the Constitution and laws of the United States are faithfully executed for the protection of America's unborn childre. Upon this act, sincerrely believed to be an act of justice, warranted by the Constitution. I invoke the considerate judgment of mankind and the gracious favor of Almighty God, I also proclaim Sunday, January 17, 1988, as

National Sanctity of Human Life Day. I call upon the citizens of this blessed land to gather on that day in their homes and places of worship to give thanks for the gift of life they enjoy and to reaffirm their commitment to the dignity of eveyr human being and the sanctity of human life.

IN WITNESS WHEREOF, I have hereunto set my hand this 15th day of January, in the year of our Lord ninteen hundred and eighty-eight, and of the Independence of the United States of America the two hundred and twelfth.

/s/ Ronald Reagan

IN THE UNITED STATES DISTRICT COURT OF GUAM
FOR THE TERRITORY OF GUAM

MARIA DOE, on behalf of herself and all others similarly situated, et al,	)	CIVIL ACTION NO. 90-00013
Plaintiffs,	)	
vs.	)	DECLARATION OF MICHAEL V. L. BENNETT
JOSEPH F. ADA, et al.,	)	
Defendants.	)	

1. I am a Professor and Chairperson of Neuroscience at the Albert Einstein College of Medicine in the Bronx, New York. I am a member of the National Academy of Sciences. Attached to this Declaration as Exhibit A is a copy of my curriculum vitae, which includes a list of some of my publications. I am submitting this Declaration in support of plaintiffs' motion fo summary judgment and permanent injhunction against public Law 30 134 ("the Act").

2. There is no scientific consensus that a human life begins at conception, at a given stage of fetal development, or at birth. The question of "when a human life begins" cannot be answered by reference to scientific principles like those with which scientists predict pianetary movement. The answer to that question will

depend on each individual's social, religious, philosophical, ethical and moral beliefs and values. These answers to not represent any "scientific" truth, because they are based uponv alues and beliefs, notupon science alone.

3. The only "consensus" that may be said to exist among scientists on teh question of when a human life begins is that science alone cannot answer that question. This is demonsotrated by the response of the scientific community when in 1991 a United Staes senate subcommittee hold he3arings on a hbill to declare "that present day scientific evidence indicates a significant liklihood that actualhuman life exists from conception.' See The Human Life Bill: Hearings Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 97th Cong., 1st Sess. (1981) (hereinafter Hearings). As distinguished scientists testified, science alone does not provide the answer to this question.

4. For example, Dr. Leon Rosenberg, then Chairman of the Department of Human Genetics, Yale University Medical School testified:

> When does this potential for human life become actual? As a scientist, I must answer I do not know. Moreover, I have not

been able to find a single piece of scientific evidence which helps me with that question.

Not surprisingly, a great deal has been spoken and written on the subject. Some people argue, as you have heard, that life begins at conception . . . .

I have no quarrel with anyone's ideas on this matter so long as it is clearly understood that they are personal beliefs based on personal judgments and not scientific truths.

Id. at 50.

5. Dr. Rosenberg then explained the reason science alone cannot answer the question -- the inability to test the hypothesis by the scientific method:

The scientific method depends on two essential things -- a thesis or idea and a means of testing that idea. Scientists have been able to determine, for instance, that the Earth is round or that genes are composed of DNA because, and only because, experiments could be performed to test these ideas. Without experiments there is no science, no way to prove or disprove any idea. I maintain that concepts such as humanness are beyond the purview of science because no idea about them can be tested experimentally.

Id.

6. The National Academy of Sciences was equally emphatic:

It is the view of the National Academy of Sciences that the statement in [Senate Bill S. 158] cannot stand up to the scrutiny of science. This section reads: "The Congress finds that present day scientific evidence indicates a significant likelihood that actual human life exists from conception." This statement purports to derive its conclusions from science, but it deals with a question to which science can provide no answer. The proposal in ??? that the term "person" shall

> include "all human life" has no basis within our scientific understanding. Defining the time at whcih the developing embryo becomes a person must remain a matter of moral or religious value.

Id. at 74. See also id. at 1036-36 (statement of Joseph Boyle, M.D., chairman of the board of trustsees of the American Medical Association) (there is no scientific consensus that a human life begins at conception; that question goes "far beyond the realm of medical science and into social, religious, philosophical, ethical, andmoral concerns").

7. Science can indeed provide valuable information and can answer concrete questions regarding prenatal development by identifying, for examplke, the stages of fetal brain development. But the question of when a human life truly begins calls for a conclusion as to which characteristics define the essence of human life.

8. Many other physicians and scientists made these observations at the 1981 hearings. See, e.g., id. at 68 (statement of Robert H. Ebert, M.D., President of Milbank Memorial Fund, Caroline Shields Walker, Professor of Medicine Emeritus, Harvard University) (whether a human life begins at conception is not a medical or scientific question, but a philosophical and religious

question that "can be debated endlessly and has to do with how one defines a person and 'self'"); id. at 69-70 (statement of Sherman M. Mellinkoff, M.D., Dean of the UCLA School of Medicine) (same) id. at 71 (statement or Arne G. Motulsky, M.D., Professor of Medicine and Genetics, University of Wahsington) (same); id. at 113-14 (statement of Dr. Jessica G. Davis, Director, Child Development Center, Chief, Division of Genetics, North Shore University Hosptial) (same). The subcommittee also received hundreds of letters from scientists and physicians across the country echoing Dr. Rosenberg's views. See e.g. Hearings app. at 414, 669, 716, 718.[1]

9. Science cannot define the essential attributes of human life any more than science can define such concepts as love, faith

[1] The fact that the subcommittee itself could not reach agreement on the question further highlights the inability to find the answer in scientific truth. The Human Life Bill -- S.158: Report by the Subcommittee on Separation of Powers, Senate Committee on the Judiciary, 97th Cong., 1st Sess. 39, 41 (1981) (miniority view of Senator Baucus) ("If the hearings on S. 158 held by the Sepration of Powers Subcommittee were conclusive on any point it is that in 1981 there remains no concensus among scientists, philosophers and theologians on the question of when life begins."). Indeed, the current Commissioner of the Food and Drug Administration, Frank E. Young, M.D., stated in 1981 that "science and medicine cannot unequivocally establish the time in the continum of development where human life begins") the decision is "in part moral, ethical, philosophical and religious." Hearings app. at 791.

or trust. Hearings at 50. This United States Supreme Court was indisputably correct when it observed in Roe v. Wade, 410 U.S. 113, 159 (1973), that the question of when a human life begins cannot simply be referred to an expert discipline for resolution.

10. While science cannot tell us which biological attributes establish the existence of a human being, science can tell us when certain biological attributes can be detected. For example, it is not until sometime after twenty-eight weeks of gestation that the fetal brain has the capacity to carry on the same range of neurological activity as the brain in a full-term newborn. Fetal brain development is obviously a ong and incremental process. Brain cells in the neocortex, the portion of the brain in which the processes we call thought, emotion and consciousness occur, must be sufficiently developed to permit this kind of neurological activity to take place.

11. At about twenty-eight weeks of gestation, brain development is marked by the sudden emergence of dendritic spines in the neocortex. Dendritic spines are essential components

in the brain's cellular circuitry.[2] One study has indicated that neocortical cells possess no dendritic spines as late as 24 to 27 weeks of gestation.[3] It is also at that time that large-scale neocortical synaptogenesis (the development of neural connections between brain cells in the neocortex) begins,[4] although limited sunaptogensis may begin as early as 19 to 22 weeks of gestation.[5] Some primitive motor activities such as swallowing and sponteneous movement of limbs, begin between eight and thirteen weeks of gestation.[6] However, the thalamocortical connections which are prerequisites for neocortical reception of

[2] M. Flower, Neuromaturation and the Moral Status of Human Fetal Life in Abortion Rights and Fetal Personhood 71, 77 (Doerr & Prescott ed. 1989) (emphasis in original) (forthcoming).

[3] D.P. Purpura, Morphogenesis of Visual Cortex in the Preterm Infant in Growth and Development of the Brain, 33, 46 (M.A.B. Brasier ed. 1975) (examining the visual cortex).

[4] Id. 45-46.

[5] Molliver, Kostovic & Van Der Loos, The Development of Synapses in Cerebral Cortex of the Human Fetus, 50 Brain Research 403-07 (1973).

[6] Flower, supra n.1 at 75.

bodily sensation do not begin to develop until approximately 22 or 23 weeks.[7]

12. In addition, regular patterned electroencephalograms (EEGs) with characteristics of an adult EEG appear at approximately 30 weeks.[8] Of course, the fact that the fetus develops the bare biological capacity for crucial neurological processes does not necessarily mean that these neurological processes actually begin to occur in this period. Indeed, the cerebral cortex is relatively nonfunctional even in normal newborns.[9]

13. The neurobiological data indicate that the fetus lacks the physical capacity for the neurological activities we associate with human thought until sometime after 28 weeks gestation. In other words, the capacity for the human thought process as we know

[7] Kostovic & Goldman-Rakic, Transient Cholonastatuse Staining in the Mediorsal Mugleus of the Thalamus and its Connections in the Developing Human and Money Brain, 219 Journal of comparative Neurology 431-37 (1983); and Human Fetal Cerebrum Revealed by Transient choliestarasa Staining, 4 Journal of Neuroscience 25-42 (1984).

[8] Flower, supra n. 1 at 79.

[9] Shewman, Capron, Warwick & Schulman, The Use of Anancephalic Infants as Organ Donors: A Critique, 261 Jouranl of American Medical Association 1773-81 (1989).

it cannot exist before tha time. Thus, although people may have differentn views as to whether the capacity for human thought is relevant to status as a human beings, the argument that a fetus should have the status of a born person because science shows that a fetus is able to think is false.

14. The Act's finding that human life begins at the moment of conception cannot draw support form science or scientific evidence. The Act's legislative findings represents the philosophical or religious judgment that human life begins at conception, and cannot be justified as legislation that merely restates a scientific fact.

WHEREFORE, I respectfully request that the Court grant plaintiff's Motion for Summary Judgment and Permanent Injunction.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: May 15, 1990 /s/ Michael V.L. Bennett
MICHAEL V.L. BENNETT

CASSIDY, FOSS & SAN FILIPPO
225 Broad Street, Box 896
Red Bank, NJ 07701-0896
(908) 741-2525
By: Harold J. Cassidy
Attorneys for the Plaintiff

Patrick J. Mullaney, Esq.
1 Madison Avenue
Morristown, NJ 07960
(201) 984-8777
Co-Counsel for the Plaintiff

J.M., a fictitious name of a real person, individually; and as guardian of his unborn child	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MONMOUTH COUNTY DOCKET NO. MON-C-66-92
Plaintiff-Appellant vs. V.C.; a fictitious name of a real individual; W.M.C., a fictitious name of a real corporation; JOSEPH BLOW AND RICHARD ROE, et al. Defendant-Respondents	CIVIL ACTION ORDER DENYING MOTION FOR RECONSIDERATION FILED ON BEHALF OF J.M., INDIVIDUALLY

THIS MATTER having been presented to the Court on behalf of J.M. in his individual capacity, seeking an Order to reconsider that portion of the court's Order of March 19, 1992, which

dismissed the Complaint brought by J.M. individually and ruling that he had no standing to raise any rights of the unborn child of V.G. and that the court having heard the matter on Tuesday, May 12, 1992, Harold J. Cassidy, Esq., appearing on behalf of the plaintiff, and Frances Farber-Walter, Esq., appearing on behalf of the defendant, and good cause having been shown;

IT IS on this 12th day of May , 1992;

ORDERED that the motion filed by J.M. in his individual capacity seeking reconsideration of the Chancery Division Order of March 19, 1992 which dismissed his Complaint in his individual capacity be and is hereby denied; and

IT IS FURTHER ORDERED that a true copy of this within Order has been served upon all parties within 7 days of the date hereof.

Signed: 5/21/92

/S/Patrick J. McGann
PATRICK J. MCGANN, J.S.C.

NOTICE OF APPEAL
SUPREME COURT OF NEW JERSEY

CASSIDY, FOSS & SAN FILIPPO
225 Broad Street, P.O. Box 696
Red Bank, New Jersey 07701-0696
(908) 741-2525
By: Harold J. Cassidy
Attorneys for the Plaintiff

J.M., individually,	:
	: DOCKET NO.
Plaintiff	:
	: ON APPEAL FROM:
vs.	: SUPERIOR COURT OF NEW JERSEY
	: APPELLATE DIVISION
V.C.;W.M.C.; JOSEPH BLOW; and RICHARD ROE, fictitious names of real individuals,	: MONMOUTH COUNTY
	: DOCKET NO. A-4772-91T5
	:
	: SAT BELOW:
Defendant	: HON. ANTELL
	: HON. DREIER
	: HON. VILLANUEVA, t/a
	:
	: TRIAL COURT:
	: Chancery Division
	: Monmouth County
	: Sat Below
	: Hon. Patrick J. McGann, JSC

TO:Clerk, Supreme Court of New Jersey
Hughes Justice Complex
CN 970
Trenton, New Jersey 08625

Clerk, Appellate Division of
the Superior Court of New Jersey
Hughes Justice Complex
CN 006
Trenton, New Jersey 08625

Frances Farber-Walter, Esq.
Stryker, Tams & Dill
Two Penn Plaza East
Newark, New Jersey 07105
Attorney for V.C.

Robert J. Del Tufo, Attorney General
Office of the Attorney General
CN 080
Trenton, New Jersey 08625

NOTICE IS HEREBY GIVEN THAT J.M. in his individual capacity only, **APPEALS TO THE SUPREME COURT OF NEW JERSEY, FROM THE WHOLE OF THE FINAL ORDER OF THE APPELLATE DIVISION OF THE SUPERIOR COURT OF NEW JERSEY** entered in this action on September 21, 1992. There is no preference under Rule 1:2-5.

THE PLAINTIFF-APPELLANT HEREBY CERTIFIES THAT THIS NOTICE OF APPEAL HAS BEEN SERVED ON:

NAME	DATE OF SERVICE	TYPE OF SERVICE
COURT APPEALED FROM:		
Clerk Appellate Division	11/4/92	Regular Mail
TRIAL COURT JUDGE:		
Patrick J. McGann, JSC	11/4/92	Regular Mail

TRIAL COURT CLERK:

	Clerk Superior Court	11/4/92	Regular Mail

ATTORNEY GENERAL OR GOVERNMENTAL OFFICE UNDER R. 2:5-1(h):

	Robert J. Del Tufo, Attorney General	11/4/92	Regular Mail

OTHER PARTIES:
NAME & DESIGNATION:

	ATTORNEY NAME, ADDRESS AND PHONE	DATE OF SERVICE	TYPE OF SERVICE
V.C.	Frances Farber-Walter, Esq. Stryker, Tams & Dill Two Penn Plaza East Newark, New Jersey 07105 (201) 624-9300	11/4/92	Regular Mail

I HEREBY CERTIFY THAT I HAVE SERVED A COPY OF THIS NOTICE OF APPEAL ON EACH OF THE PERSONS REQUIRED AS INDICATED ABOVE.

NOVEMBER 4, 1992 By: Harold J. Cassidy
HAROLD J. CASSIDY, ESQ.

I HEREBY CERTIFY THAT THE TRANSCRIPT OF PROCEEDING IS IN THE POSSESSION OF PLAINTIFF'S COUNSEL OF RECORD, CASSIDY, FOSS & SAN FILIPPO.

NOVEMBER 4, 1992 By: Harold J. Cassidy
HAROLD J. CASSIDY, ESQ.

I FURTHER CERTIFY THAT THE APPELLANT HAS COMPLIED WITH RULE 2:5-1(f)(2) (CASE INFORMATION STATEMENT) AND THE C.I.S. FILED IN THE APPELLATE DIVISION IS ATTACHED HERETO TOGETHER WITH AN UPDATED STATEMENT PERTAINING TO THIS APPEAL.

NOVEMBER 4, 1992 By: Harold J. Cassidy
HAROLD J. CASSIDY, ESQ.

SUPREME COURT OF NEW JERSEY
CIVIL CASE INFORMATION STATEMENT

TITLE IN FULL:

J.M., individually
NO.
Plaintiff-Appellant

vs.

V.C., W.M.C., Joseph Blow and Richard Roe, fictitious names of real individuals

FOR OFFICIAL USE ONLY

SUPREME COURT DOCKET

NOTICE OF APPEAL
FILED: November 4, 1992

DATE SENT: November 4, 1992

APPELLANT'S ATTORNEY(S): XX Plaintiff Defendant Other (specify)

NAME	ADDRESS	TELEPHONE	CLIENT
Cassidy, Foss individually & San Filippo	225 Broad Street Red Bank, New Jersey 07701	(908) 741-2525	J.M.,

RESPONDENT'S ATTORNEY(S)*:

NAME	ADDRESS	TELEPHONE	CLIENT
Frances Farber-Walter	Two Penn Plaza East Newark, New Jersey 07105	(201) 624-9300	V.C.

[*Indicate which parties, if any, did not participate below or who were no longer party to the action at the time of entry of the Order/Judgment being appealed.]

GIVE DATE AND SUMMARY OF TERMS OF JUDGMENT ENTERED BELOW:

Does this determination dispose of all issues

as to all parties? Yes X No __

If not, has it been certified as final pursuant to R. 4:42-2? Yes __ No __ N/A

If not, leave to appeal must be sought. R.2:2-4, 2:5-6.)

Is the validity of a statute, executive Order, franchise or constitutional provision of this State questioned? (R. 2:5-1(h)). Yes X No __

GIVE A BRIEF STATEMENT OF THE FACTS AND PROCEDURAL HISTORY:

See attached.

TO THE EXTEND POSSIBLE, LIST THE PROPOSED ISSUES TO BE RAISED ON THIS APPEAL, AS THEY WILL BE DESCRIBED IN APPROPRIATE POINT HEADINGS PURSUANT TO R. 2:6-2(a)(5). Appellant or cross appellant only.

See attached.

All civil appeals will be screened under the civil Appeals Settlement Program to determine their potential for settlement or, in the alternative, a simplification of issues, abbreviation of transcript and any other matters that may aid in the disposition or handling of the appeal. Please consider these when responding to the following question.

State whether you think this case may benefit from a conference. Yes __ No X

Explain your answer.

The subject of the dispute requires a decision of the Supreme Court of New Jersey.

A negative response will not necessarily rule out the scheduling of a pre-argument conference.

1. IS THERE ANY CASE NOW PENDING OR ABOUT TO BE BROUGHT BEFORE THIS COURT WHICH:

   (A) Arises from substantially the same case or controversy as this appeal? Yes __ No X

   (B) Involves an issue that is substantially the same, similar or related to an issue in this appeal? Yes X No __

2. WAS THERE ANY PRIOR APPEAL INVOLVING THE CASE OR CONTROVERSY?

   Yes __ No X

IF YES, STATE:

As to (1) above: State of N.J. v. Alexander Loce, App. Div. Docket No. A-934-91.

As to (2) above: This party has had no prior appeal. His child's case was the subject of Order of the Court dated March 24, 1992; M-969; M-970; and M-971.

The time for filing your brief and appendix is governed by Rule 2:6-11 unless modified by court order. If any circumstances exist which might justify a shorter or longer period of time, give a detailed explanation. Your answer does not alter the time limits set forth in the Rules of Court.

Appellant files within the requirement of 2:6-11.

In the event there is any change with respect to any entry on the Case Information Statement, appellant shall have a continuing obligation to file an amended Case Information Statement on the prescribed form.

J.M., Individually — Harold J. Cassidy, Esq.

Name of Appellant or Respondent — Name of Counsel of Record

_____ — /s/ Harold J. Cassidy, Esq.

A BRIEF STATEMENT OF FACTS AND PROCEDURAL HISTORY

This is an action brought by J.M. in his own individual capacity asserting his own claim including his right to act as guardian ad litem of his unborn child, brought against V.C., the mother of J.M.'s child, seeking to adjudicate the relative rights of J.M., V.C. and the unborn child, and further seeking an injunction of an abortion.

J.M., who is 38 years of age, was dating V.C. when she became pregnant with J.M.'s child out of wedlock. J.M. had offered to marry V.C. but she had determined that she was not prepared at that time for marriage. The two discussed the future of their child and when V.C. announced to J.M. that she intended to terminate the child's life, despite J.M.'s pleas to the contrary, J.M. instituted this suit to enjoin the abortion, asserting, among other rights, his right to act as the guardian ad litem of the child.

The trial court had ruled that J.M. did not have standing to raise the rights of the unborn child, that he had no right to act as guardian ad litem, and dismissed his individual complaint. The action was instituted on March 9, 1992 and on that date the trial court entered an injunction against V.C. On March 19, 1992 V.C. moved to dismiss the complaint of J.M. individually. The trial judge dismissed the Complaint of J.M. individually but denied the application as it pertained to the action maintained by the unborn child. V.C. moved before the Appellate Division for leave to appeal the denial of the dismissal of the unborn child's action and plaintiff J.M. individually moved for leave to appeal the dismissal of his individual claim. The Appellate Division denied both motions, except it granted leave as it related to the entry of the injunction and entered an Order dissolving the injunction. The Appellate Division declined to disturb the Complaint on behalf of the unborn child and refused to entertain the portion of the Order of March 19 dismissing J.M.'s individual Complaint.

A motion for leave to Appeal to the New Jersey Supreme Court filed by V.C. was granted and the Supreme Court summarily reversed the Chancery Division dismissing the unborn child's complaint. The motion for leave to appeal filed in the New Jersey Supreme Court by J.M. in his individual capacity was denied. J.M.

filed a motion for reconsideration in the Chancery Division in a timely manner. After the Chancery Court denied J.M.'s individual motion for reconsideration, J.M. filed a timely Notice of Appeal in the Appellate Division. The Appellate Division entered an Order affirming the Chancery Division on September 21. 1992.

ISSUES TO BE RAISED

This Appeal, filed by J.M., individually, presents the following issues to be raised on appeal without prejudice:

1. The unborn child of J.M. and V.C. is as a matter of fact and law an individual member of the human race to whom constitutional rights under State and Federal law are extended. The unborn child is an individual member of the human race from the moment of conception.

2. J.M. individually has a right under both the State and Federal Constitutions to defend life which includes the life of his unborn child (N.J. Const. Article I, Section I).

3. J.M. individually has the standing to litigate the unborn child's substantive rights, and has a right to act as Guardian Ad Litem of his child prior to birth.

4. Included in the rights of the unborn child is the child's right to have one or both of his parents to assert his or her rights.

5. J.M. individually possesses a right to raise the legal rights of his children, including a child who is unborn.

6. The unborn child enjoys constitutional protection under the due process clause of the Fourteenth Amendment of the United States Constitution and under Article I, Section I of the Constitution of the State of New Jersey.

7. If the state has a compelling interest in protecting the life of an unborn child, then the child's father has an interest and corresponding right to protect that same life.

8. Extending the right of abortion to V.C. over the objections of the father (in both or one capacity) is violative of public policy of the State of New Jersey that the unborn child is an individual to whom others owe a duty; the policy of the State of New Jersey arises out of the government's populous. It is against the public policy of the State of New Jersey which bases decisions concerning children upon what is in the best interest of the children; it is contrary to public policy that the State does not terminate parental rights unless there is a showing of abandonment or neglect; it is against the public policy of the State of New Jersey which extends the rights to parents to protect the life of their children.

9. Balancing the rights of J.M. as guardian against the right of V.C. require a denial of an abortion to V.C.

10. The privacy rights of V.C. do not include decisions about abortion where the mother's life is not threatened and the pregnancy is not the result of rape or its equivalent.

11. The nature of the mother's rights concerning termination is not "fundamental" where the mother's life is not threatened and the pregnancy is not the result of rape or its equivalent.

12. J.M. has his own individual and constitutional rights which include a fundamental right under State and Federal law of companionship or association with his child and that right exists prior to the child's birth.

13. J.M. individually, possesses, under State and Federal Law, a fundamental constitution right to procreate which would be denied him in the state that extended the right of abortion to V.C.

14. J.M. individually, possesses under both State and Federal Law the constitutional right to discharge his duty to his children, including his duties to the child prior to actual birth.

15. J.M. individually is entitled to equal protection of the laws, under both State and Federal Law, which would be denied him if the State extended, a right of abortion to V.C.

16. The balancing of the rights of J.M. against those of V.C., if any, requires a denial of an abortion to V.C.

17. The specific authorization by the State of New Jersey for the taking of the life of children any time prior to birth is in violation of both the State and Federal Constitution.

A. There Is No Final Judgment Regarding Petitioner's Claims As An Individual.

Petitioner initiated this case in the State trial court with a complaint seeking an injunction prohibiting respondent from obtaining an abortion. petitioner brought the complaint on behalf of himself and as guardian *ad litem* for the fetus. The trial court dismissed the complaint insofar as it was brought on behalf of petitioner individually, but declined to dismiss the complaint brought on behalf of the fetus, and on that basis temporarily enjoined respondent from having an abortion. Both parties sought emergent leave to appeal from the State appellate courts. The New Jersey Supreme Court ultimately granted respondent leave to appeal, summarily reversed and vacated the temporary restraints and summarily dismissed the complaint brought on behalf of fetus. The appellate courts, however, denied petitioner leave to appeal the dismissal of the complaint brought on behalf of himself individually, so that portion of the trial court's decision was never heard by the appellate courts.

Following the New Jersey Supreme Court's order denying him leave to appeal, petitioner returned to the trial court and moved for reconsideration of the order dismissing the complaint brought on

behalf of petitioner individually. When the motion for reconsideration was denied, petitioner filed a notice of appeal of the trial court's dismissal of his individual claim. This appeal was as of right and timely filed, and it is still pending in the Appellate Division of the New Jersey Superior Court.[2]

Under 28 U.S.C. §1257, Supreme Court review of State Court decisions is available only with respect to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." This "final judgment rule" is the first requirement for jurisdiction under Section 1257. Generally, to be reviewable the State court judgment "must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street R. Co. v. Railroad Comm'n*, 324 U.S. 548, 551 (1945).

[2] Petitioner's appeal to the Appellate Division is as of right pursuant to N.J. Ct. R.2:2-3(a)(1). Although the notice of appeal was filed more than 45 days after the order dismissing the complaint brought by petitioner individually, see N.J. Ct. R.2:4-1(a), the time for filing was properly tolled by petitioner's motion for reconsideration. See N.J. Ct. 4.2:4-3(e); N.J. Ct.R. 4:49-2.

The finality rule "serves several ends: (1) it avoids piecemeal review of federal courts of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real 'case' or 'controversy' in the sense of Art. III; (3) it limits federal review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs." *North Dakota Pharmacy Board v. Snyder's Stores*, 414 U.S. 156, 159 (1973).

Although a State trial court order may qualify for review under Section 1257, this is true only if the order cannot be reviewed by *any* State appellate court. *See Grovey v. Townsend*, 295 U.S. 45, 47 (1935). But where there is an appeal as of right in a higher court, or even if discretionary review is available, such review must be sought. *See Benton v. Maryland*, 395 U.S. 784, 786 (1969); *Tumey v. Ohio*, 273 U.S. 510, 515 (1927).

In this case, petitioner has properly taken an appeal as of right from the trial court's decision to dismiss his individual complaint, and that appeal is still pending in the New Jersey Superior Court, Appellate Division. The appeal raises all the same federal constitutional issues petitioner seeks to raise before this Court.

This pending appeal in the New Jersey State court system bars review of petitioner's claim in this Court.

Citing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), however, petitioner argues that the pending State court appeal does not preclude jurisdiction under Section 1257. See Cert. Pet. 3.[3] *Cox* represents a line of cases where this Court has found finality under Section 1257, despite the pendency of State court proceedings, in limited circumstances where the federal issues have been finally decided by the State's highest court, the remaining State court proceedings involve only collateral, non-federal issues, and important policy considerations favor immediate review of the federal issues in this Court. *See, e.g., North Dakota Pharmacy Board v. Snyder's Stores*, 414 U.S. at 159-64.[4]

[3] Because the petitions at issue are virtually identical, reference throughout is made to the petition in No. 91-2034 as "Cert. Pet. ___," and the appendix thereto as "Apx. Vo. __, at __." The appendix to this brief in opposition is cited as "App. __a."

[4] *Cox*, 420 U.S. at 479-85, identified four circumstances where finality can exist despite pending proceedings in the State courts: (1) where for all practical purposes the federal issue is conclusively determined, so that, for example, only ministerial acts remain; (2) where the federal issue is finally decided by the State's highest court, and will survive and require review regardless of the outcome of further State court proceedings; (3) where the federal issue is finally decided, but with further proceedings in the State

But although *Cox* represents the "practical rather than a technical construction" this Court has applied to the finality requirement, *see Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949), this approach is not meant to "swallow the rule" of finality embodied in Section 1257, *Flynt v. Ohio*, 451 U.S. 619, 622 (1981), and in situations falling outside the categories mentioned in *Cox*, it still remains true that the existence of pending State court proceedings will preclude review in this Court. In *Flynt*, for example, this Court concluded that it lacked jurisdiction under Section 1257 to review a State supreme court decision rejecting a cliam of discriminatory prosecution asserted by the publisher of an allegedly obscene magazine. Although the publisher claimed that the prosecution violated his federal rights, and that a favorable ruling on constitutional grounds would terminate the litigation, this Court found that the State court judgment was not "a final judgment within any of the four exceptions identified in *Cox*," and that Supreme Court review court

courts, regardless of their outcome, later review of the federal issue cannot be had; and (4) where the federal issue has been finally decided, reversal on the federal issue could be dispositive and refusal immediately to review the State court decision could seriously erode federal policy.

"await final judgment without any adverse effect upon important federal interests." *Id.* at 621, 622.

None of the *Cox* exceptions to the finality rule apply in this case simply because the New Jersey Supreme Court's decision never reviewed the trial court's dismissal of petitioner's complaint brought on behalf of himself at all, but instead merely denied leave to appeal. The issues raised in petitioner's pending appeal in the New Jersey Appellate Division are not collateral state-law issues, but are the very same federal issues petitioner seeks to bring before this Court. Consequently, petitioner's federla issues have not yet been conclusively adjudicated in the State courts, and there is no final judgment on his federal claims brought as an individual. Therefore, this Court lacks jurisdiction under Section 1257.

SUPREME COURT OF NEW JERSEY
M-527 September Term 1992
35,952

J.M., etc.,

Plaintiff,

v.

V.C., et al.,

Defendants.

This matter having been duly presented to the Court, it is ORDERED that the motion for leave to file an overlength brief is granted.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 8th day of December, 1992.

/s/ Stephen Townsend

Clerk of the Supreme Court

SUPREME COURT OF NEW JERSEY
M-890 September Term 1992
35,952

J.M., Individually,

Plaintiff-Movant,

v.

V.C.,

Defendant-Respondent,

and

W.M.C., JOSEPH BLOW
and RICHARD ROE, fictitious
names of real individuals,

Defendants.

This matter having been duly presented to the Court;

It is ORDERED that the motion for leave to file an overlength brief is granted.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 9th day of March, 1993.

/s/ Stephen Townsend

Clerk of the Supreme Court

SUPREME COURT OF NEW JERSEY
M-891 September Term 1992
35,952

J.M., Individually,

Plaintiff-Movant,

v.

V.C.,

Defendant-Respondent,

and

W.M.C., JOSEPH BLOW
and RICHARD ROE, fictitious
names of real individuals,

Defendants.

This matter having been duly presented to the Court;

It is ORDERED that the motion for leave to file a supplemental brief is granted.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 9th day of March, 1993.

/s/ Stephen Townsend

Clerk of the Supreme Court

SUPREME COURT OF NEW JERSEY
M-889 September Term 1992
35,952

J.M., Individually,

Plaintiff-Movant,

v.

V.C.,

Defendant-Respondent,

and

W.M.C., JOSEPH BLOW
and RICHARD ROE, fictitious
names of real individuals,

Defendants.

This matter having come before the Court on an appeal as of right pursuant to Rule 2:2-1(a)(1), based on plaintiff's assertion that the matter presents a substantial constitutional question concerning whether a developing human embryo should be regarded as a person from the moment of conception for purposes of constitutional protection under the Fourteenth Amendment;

And the Court having determined that the question posed by plaintiff is governed by current law, Planned Parenthood v. Casey, 505 U.S. __, 112 S.Ct. 2791, 120 L.Ed. 2d 674 (1992;

And good cause appearing;

It is ORDERED that the motion to dismiss the appeal is granted.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 9th day of March, 1993.

/s/ Stephen Townsend

Clerk of the Supreme Court

Chief Justice Wilentz and Justices Clifford, Handler, Pollock, O'Hern, Garibaldi, and Stein join in this Order.

A-223

SUPREME COURT OF NEW JERSEY
M-888 September Term 1992
35,952

J.M., Individually,

Plaintiff-Movant,

v.

V.C.,

Defendant-Respondent,

and

W.M.C., JOSEPH BLOW
and RICHARD ROE, fictitious
names of real individuals,

Defendants.

This matter having been duly presented to the Court;

It is ORDERED that the motion of International Right To Life Federation, Inc., et al., for leave to appear as amici curiae is dismissed as moot.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 9th day of March, 1993.

/s/ Stephen Townsend

Clerk of the Supreme Court

CASSIDY, FOSS & SAN FILIPPO
225 Broad Street
P.O. Box 896
Red Bank, New Jersey 07701
(201) 741-2525
Attorneys for

J.M., individually,	SUPREME COURT OF NEW JERSEY
Plaintiff-Appellant,	DOCKET NO. 35,952
vs.	Civil Action
V.C., et al.	CERTIFICATION IN LIEU OF OATH OR AFFIDAVIT OF J.M. SETTING FORTH THE FACTS HERETO UNDISCLOSED TO THE COURT
Defendant-Respondent	

J.M., being of full age, deposes and says:

1. I am J.M. the plaintiff in this case. I submit this certification under seal and I request that the Court, for the reasons expressed below, maintain this Certification under seal until March 15, 1993. I sign a second Affidavit, made out in my full name, bearing my full signature, certifying that I am indeed the person who swore out this Certification which is signed with my initials only.

2. When this lawsuit was commenced in March of 1992, it quite naturally placed a strain on the relationship that I had with V.C. That relationship was permanently altered. After the Supreme Court vacated the injunction in this case, however, V.C. and I began seeing each other again and we were able to do so despite the feelings that we had concerning the lawsuit. I must tell the Court, however, that our relationship was in fact changed and the ongoing lawsuit represented a deep difference in our beliefs concerning abortion. V.C. told me that her lawyers had asked her to receive some kind of acknowledgement or award because of her stand on abortion. She told me that she declined and would not attend a dinner they wanted her to attend. Nonetheless, she has steadfastly maintained that her legal position was, and still is, correct.

3. Thereafter, V.C. became pregnant for the second time with my child in June of 1992. When she told me that she was pregnant with my child, it was an extremely difficult situation for both of us. At a point when the new child was approximately ten weeks old, V.C. advised me that she was planning to have another abortion and she actually scheduled the procedure. I felt extraordinarily helpless. I felt it was unnatural to be in a position

where I had no way of protecting the child and was unable to seek protection through the Courts or any other means. V.C., after a number of days told me she changed her mind and she decided not to have an abortion. When she told me this, she told me that it was because she was convinced that the child would experience pain and she was unable to subject her new baby to that experience and she would be unable to live with it. At the very same time, she cautioned me never to tell anyone that she was "pro-life" because she believes it is a mother's right to have an abortion. She repeatedly stated that her position in this lawsuit is legally correct.

4. Shortly after V.C. advised me that she would not terminate the life of the child, she told me that she did not want me to communicate with her any longer. As a result of this demand, I was not able to speak to her, see her or effectively communicate with her at all. I was not really sure if she was carrying the child and I lived daily with the concern of not knowing what was happening with the child. In addition, I was concerned about V.C. because I had seen how heavily the decision about abortion wand about carrying the child weighed upon her. She literally was living with a day to day judgment about whether

another human being would live or die. She told me that she was not in communication with her lawyers concerning this. She has told me that as of this date, she still is afraid to tell her lawyers.

5. For my part, I had to honor her request and could never advise her one way or another. For the sake of the child's life, I felt I could do or say nothing that would be interpreted as "pressure." The decision not to terminate the child's life, as positive as it was and as happy as it made both of us, was tempered by the fact that the continuing "right" to terminate the child became a barrier between V.C. and myself and weighed upon V.C. Yet, it was the two of us who were anticipating the coming of the child. At the time when the child was approximately 20 weeks old, V.C. communicated with me because she was having some difficulties. I saw her and spoke to her a few times and the baby was healthy. Thereafter, we spoke on occasion, but I always knew that if V.C. decided to terminate her pregnancy, she would never tell me in advance. V.C. told me that she did not want to tell too many people so she would not be subjected to the pressure others might bring upon her to terminate the child. She did refuse to communicate with me at times and I had no way of knowing if she was going to terminate the child's life. Because there is no

legal obligation for her to advise me of her intentions, and because, as I understand through my lawyers, New Jersey authorizes abortion at any time, even after the child is 20 weeks old, I was not in a position to protect the chid even after "viability" because I would never know the intentions of V.C. in advance. I have deliberately avoided discussing this problem or brings this to the Court's attention because I did not wish to bring any pressure to bear upon V.C. or to embarrass her at a time when stress could cause her problems with the pregnancy. At the present time, the baby is approximately 32 weeks old and is due to be born the first week of March, 1993.

6. I do not want any pressure or embarrassment for V.C. I feel obligated to disclose this information to the Court and I believe it is likely that the information will be made public at some point during this case. I personally preferred to disclose this information to the Court before they made a decision on the motion filed by v.C. Although I do not know whether the Court could consider it significant or not. At this stage both V.C. and the baby should be out of danger. Yet, I am concerned that if this Certification is made part of the public record, that it might someday appear in a newspaper. I do not want any stress for V.C. while she is carrying

the child and I ask that the Court keep this certification under seal until mid-March after the child is born. Thereafter, I believe it is as important as ever that the identities of the parties not be revealed. For one thing, the new baby should be protected from the information of the history of the first pregnancy as well as the disclosures that I make in this certification.

7. The experience that we have had during this second pregnancy, because of the ongoing abortion decision, has pulled us apart instead of bringing us together as parents. It clearly placed extra pressure on V.C. to make a constant, continuing and daily decision about whether her child would live or die. It placed me in a position of total helplessness. I believe some of her expressions to me show a regret that she had the first abortion. Maybe worse of all was listening to V.C.'s expressions and how I saw the awful way she felt at the thought that she might subject a child to a painful, brutal death.

8. I hereby certify that the foregoing statements made by me are true. I understand that if any of the statements made by me are willfully false, I am subject to punishment.

/s/ J.M.
J.M., Plaintiff-Appellant

Dated: January 22, 1993

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Attorneys for

J.M., individually,	SUPREME COURT OF NEW JERSEY
Plaintiff-Appellant,	DOCKET NO. 35,952
vs.	Civil Action
V.C., et al.	CERTIFICATION IN LIEU OF OATH OR AFFIDAVIT OF MOTHER TERESA OF CALCUTTA SUBMITTED ONBEHALF
Defendant-Respondent	OF PLAINTIFF-APPELLANT J.M., INDIVIDUALLY, IN OPPOSITION TO DEFENDANT V.C.'S MOTION FOR SUMMARY DISPOSITION (OR DISMISSAL)

MOTHER TERESA, being of full age, deposes and says:

1. I am Mother Teresa of Calcutta, India and I reside at 54/A ACH.JAGDISH, Ch. BOSE RD., Calcutta, India 700 016. I am the founder and Mother Superior of the Missionaries of Charity founded in 1950 which maintains its headquarters here in Calcutta.

2. I submit this Certification to the New Jersey Supreme Court in the case of J.M. v. V.C. I understand that this

Certification is used to oppose a motion that has been filed with the Court by the defendant, V.C., which requests that the Court dispose of this very important case in a summary fashion or to rule that the case should be dismissed because it does not present substantial constitutional issues.

3. I submit this Certification primarily because this case is clearly one of such public importance for people everywhere in the world that it should be treated in a complete fashion, and should be given full attention by the Court. I urge that the Court write a complete opinion after full argument and only after people of good will and conscience have been given the opportunity to address the Court on the important questions the case presents, in the capacity of "Friends of the Court."

4. Our Missionaries of Charity have provided services for the poor in many parts of the world. In the United States our main office is at 335 East 145th Street, Bronx, New York 10451. As part of our work we provide services to children and to poor families. I have traveled to different parts of the world and I believe that I speak for many, many millions of people when I tell the New Jersey Supreme Court that there are many who know and appreciate the sanctity of human life and the special uniqueness of

each one of us. There may be no other issue of greater importance to contemporary mankind than the question of whether each one of us has the right to live, even before birth.

5. I am not educated in the laws of the United States. However, if it is true, as I understand, that the American Courts have never directly answered the question of when the life of each of us begins and whether a child is a member of the human race prior to birth; or whether the child has rights (in the context of abortion) then I indeed speak for many millions in saying that we cannot continue along the course that we have taken without first answering these centrai questions and the question of whether any person or any government has the right to terminate the life of another ^ innocent human being. ~~solely based upon questions of convenience.~~

6. I urge this most noble Court to decline the invitation of the defendant, V.C., to treat this important case in a summary manner. I urge that this Court have a full argument and write a full opinion on these most important questions, and ultimately rule that no government can ^ violate ~~withhold~~ the right to live from any ^ innocent human being. The future of the human race and the dignity of human life

depends upon the resolution of ~~the~~ such as those questions ^ that are before this Court in this case. It would be a grave injustice to all mankind if the Court were to sanction the argument of the defendant on her motion to dismiss this appeal: that these issues are not worthy of review or are too unimportant to address. Organizations which have expertise to offer to the Court should be given an opportunity to file with the Court before the Court reaches any decision in this case. I am very grateful to the New Jersey Supreme Court for this opportunity to be heard on this motion. If the Motion for Summary Disposition is denied and the case goes forward in a full way, I shall review whether I myself or any organization with which I am associated would file a Friend of the Court Brief in this case. Thank you for reading this Certification and God Bless the important work of this Court.

7. I hereby certify that the foregoing statements made by me are true. I understand that if any of the statements made by me are willfully false, I am subject to punishment.

/s/ Mother Teresa mc
Mother Teresa
Missionaries of Charity

Dated: 26 February , 1993

REGULATION OF THE BOARD OF MEDICAL EXAMINERS OF THE STATE OF NEW JERSEY 13:35-4.2 (TERMINATION OF PREGNANCIES)

13:35-4.2 Termination of Pregnancy

(a) This rule is intended to regulate the quality of medical care offered by licensed physicians for the protection of the public, and is not intended to affect rules of the Department of Health establishing institutional requirements. To the extent that rules of the two agencies may overlap, the Medical Board recognizes and relies upon the regulatory procedures of the Department of Health in establishing minimum acceptable standards for non-physician personnel, equipment and resources, the adequacy of the physical plant of the facility in which surgical procedures shall be performed, and the facility's interrelationship with an adequate network of health care-related resources such as ambulance service, etc.

(b) The termination of a pregnancy at any stage of gestation is a procedure which may be performed only by a physician licensed to practice medicine and surgery in the State of New Jersey.

(c) Provisions of this rule referring to stage of pregnancy shall be in terms of weeks from start of last menstrual period or "weeks LMP." For example, the stage of pregnancy at 12 weeks gestational size, as determined by a physician, is the equivalent of 14 weeks from the first day of the last menstrual period (LMP).

(d) After 14 weeks LMP, any termination procedure other than dilation and evacuation (D & E) shall be performed only in a licensed hospital.

(e) Fifteen weeks through 18 weeks LMP: After 14 weeks LMP and through 18 weeks LMP, a D & E procedure may be performed either in a licensed hospital or in a licensed ambulatory care facility (referred to herein as LACF) authorized to perform surgical procedures by the Department of Health. The physician may perform the procedure in an LACF which shall have a Medical Director who shall chair a Credentials Committee. The Committee

shall grant to operating physicians practice privileges relating to the complexity of the procedure and commensurate with an assessment of the training, experience and skills of each physician for the health, safety and welfare of the public. A list of the privileges of each physician shall contain the effective date of each privilege conferred, shall be reviewed at least biennially, and shall be preserved in the files of the LACF.

(f) Nineteen weeks through 20 weeks LMP: A physician planning to perform a D & E procedure after 18 weeks LMP and through 20 weeks LMP in an LACF shall first file with the Board a certification signed by the Medical Director that the physician meets the eligibility standards set forth in (f)1 through 7 below and shall comply with its requirements.

1. The physician is certified or eligible for certification by the American Board of Obstetrics-Gynecology or the American Osteopathic Board of Obstetrics-Gynecology, and the physician satisfactorily completes at least 15 hours of Continuing Medical Education each year in obstetrics-gynecology.

2. The physician has admitting and surgical privileges at a nearby licensed hospital which has an operating room, blood bank, and an intensive care unit. The hospital shall be accessible within 20 minutes driving time during the usual hours of operation of the clinic.

3. The procedure shall be done in a location which is designated by the Department of Health as a licensed ambulatory care facility (LACF) authorized to perform surgical procedures as in subsection (e) above. The LACF shall be licensed by the Department of Health as an ambulatory care facility authorized to perform surgical procedures. The facility shall be in current and good standing at all times when surgical procedures are performed there. The LACF shall have a written agreement with an ambulance service assuring immediate transportation of a patient at all times when a patient has been admitted for surgery and until the patient has been discharged from the recovery room.

4. The procedure shall be done in an LACF which shall have a Medical Director and a Credentials Committee which have duly

evaluated the training, experience and skill of the physician at continuous and successive levels of complexity of the D & E procedure in pregnancies advancing in stages from 18 weeks LMP through 19 weeks LMP through 20 weeks LMP, and the physician has been granted successive practice privileges consistent with management of the increased risk to the health and safety of the patient at that stage documented in the personnel file maintained for that physician. (Where the applicant physician is also the Medical Director, the physician shall submit a certificate from the Administrator or Chief of Department of a hospital or the Medical Director of an LACF where the applicant has been evaluated and credentialed in a comparable manner.) The physician new to the LACF shall have his or her operating technique evaluated initially and at least yearly by the Medical Director or his or her designee who shall possess appropriate experience with D & E procedures at least as advanced as those for which the applicant physician seeks approval. The applicant shall be evaluated during that number of procedures which shall be adequate to achieve a sufficient professional skill, and the evaluation procedure shall be documented in the personnel file maintained for that physician. The Medical Director shall agree to review the charts of all patients who suffer complications and in addition shall review charts at random, and shall calculate the complication rate of each physician.

5. The physician shall perform the procedure only on a patient who has been examined and found to be within the eligibility criteria established for advanced D & E procedures in the LACF setting.

6. The procedure shall be performed in an LACF providing adequate staff support and resources for the operative procedure as well as interim follow-up and post-operative care, and where a physician is available and readily accessible 24 hours/day to respond to any postoperative problem.

7. The physician shall cooperate with the Medical Director to maintain contemporaneous and cumulative statistical records demonstrating the utilization and safety record of each stage procedure and of each surgeon. Said records shall be available for inspection by the Board and copies shall be submitted to the Board

semi-annually. These records shall include the following information and data shall be maintained in records compiled monthly, but individual patients comprising the lists shall be identified only by date and by initials and/or case number:

i. Number of patients who received termination procedures;

ii. Number of patients who received laminaria or osmotic cervical dilators who failed to return for completion of the procedure;

iii. Number of patients who reported for postoperative visits;

iv. Number of patients who needed repeat procedures;

v. Number of patients who received transfusions;

vi. Number of patients suspected of perforation;

vii. Number of patients who developed pelvic inflammatory disease within two weeks;

viii. Number of patients who were admitted to a hospital within two weeks of the procedure.

ix. Number of patients who died within 30 days.

Subparagraphs ii. through ix. above shall be summarized by number and percentage of monthly total for post-18 week procedures. The Board shall inspect such reports monthly for the first five months and at such further monthly intervals as it deems necessary.

(g) After 20 weeks: A physician may request from the Board permission to perform D & E procedures in an LACF after 20 weeks LMP. Such request shall be accompanied by proof, to the satisfaction of the Board, of superior training and experience as well as proof of support staff and facilities adequate to accommodate the increased risk to the patient of such procedure.

(h) The physician shall make suitable arrangements to insure that all tissues removed shall be properly disposed of by submission to a qualified physician for pathologic analysis or by incineration or by delivery to a person/entity licensed to make biologic and/or tissue disposals in accordance with law including rules of the Department of Health applicable to an LACF.

92-1934

(3)

No. 92- 92-1934

Supreme Court, U.S.
FILED
JUN 7 - 1993
OFFICE OF THE CLERK

92-1934

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

J.M. INDIVIDUALLY

Petitioner,

- against -

V.C., [redacted]

Respondent.

VOLUME II OF PETITIONER'S APPENDIX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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A-239

SUPREME COURT OF NEW JERSEY

DOCKET NO. 35,952

J.M., individually	:	ON APPEAL FROM:
	:	SUPERIOR COURT OF NEW JERSEY
	:	APPELLATE DIVISION
Plaintiff-Appellant	:	DOCKET NO. A-4772-91T5
	:	
vs.	:	
	:	SAT BELOW:
	:	
V.C.; W.M.C.;	:	JUDGE(S): ANTELL
JOSEPH BLOW AND	:	DREIER
RICHARD ROE,	:	VILLANUEVA, t/a
fictitious names	:	
of real individuals,	:	
	:	
Defendants.	:	
	:	CIVIL ACTION
	:	

BRIEF OF PLAINTIFF-APPELLANT J.M., INDIVIDUALLY

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Statement of the Case: Nature of the Action, Statement of Facts, and Procedural History.

A. INTRODUCTION

This is an Appeal as of Right pursuant to Rule 2:2-1(a)(1). It presents important questions of first impression under the Constitutions of the State of New Jersey and the United States of America. It addresses perhaps the worst governmental deprivation of Individual Rights in the history of this state and this nation. It presents, among other issues, a state question that only the New Jersey Supreme Court can resolve: does the Constitution of the State of New Jersey extend rights to, and provide protection for, a child prior to birth?[1] Or does a mother have a right to take the life of her own child, for any reason, or no reason at all, at any time prior to birth despite the fact that the child is a human being who experiences pain? It requires a determination of whether the

[1] Depending upon the resolution of the federal constitutional issues, the N.J. Supreme Court may determine that the federal law eclipses that of the state up to "viability." However, because the state constitution, extends the right to life to the child from the moment of conception, the child's state's right prevail from viability onward. This question has unique significance in New Jersey because there are neither criminal nor civil prohibitions against post-viability abortions and the state specifically authorizes abortions after "viability"; see discussion below Point I, (A)(1) at pp. 16-21 to pp. 18-5.

State of New Jersey has the power to withhold rights from any class of individuals or whether the right of a human being to live depends solely upon the fact of his or her existence, independent of any governmental or political "grant". It implicates the role of government itself: is government created by people to protect their individual existence or does government exist independent of the people who only exist by the tolerance of government?

The appellant, J.M. brings this appeal seeking a reversal of the Appellate Division's affirmance of the ruling of the Chancery Court that he possessed no right to act as Guardian Ad Litem of his child [to prosecute the rights of his child] and no individual rights of his own.

This case involves the direct clash of the rights of the mother, the father and the child, implicating the definition, scope and nature of those rights, the required balancing of each, and the powers and duties of the State in protecting the rights of each, where the two natural parents disagree on the fundamental question of whether their child should continue to live.

There is no question (and the defendant has effectively conceded) that this case presents a justiciable controversy,[2] and that this court has jurisdiction[3] to decide the important issues. There will probably never be another civil case in this jurisdiction which affords a better opportunity for the court to address them.

B. STATEMENT OF FACTS

(i) The Relationship of J.M. and V.C.

J.M., 38 years of age, met V.C., 32, in July 1991. In September, 1991, the plaintiff first proposed marriage to the defendant. V.C., declined, indicating that she would consider marriage in the future. In February, 1992, V.C. suspected she was pregnant (by J.M.). A self-administered pregnancy test proved positive and a repeat test in the presence of the plaintiff duplicated that result (see certifications of J.M. at 9a to 18a). On Monday, March 2, 1992, V.C. was examined by a physician in Monmouth County (N.J.) who confirmed that she was then eight (8) weeks pregnant. J.M. expressed his support to her, again proposed marriage, and indicated that he would discharge his obligations as

[2] See discussion below at Pb. 13-7 to Pb. 14-16.

[3] See discussion Pb. 13-7 to Pb. 16-4.

father, whether or not they married or she felt capable of assisting in rearing the child. V.C. told J.M. that she was still unprepared for marriage and on March 4, 1992, she advised him that she had scheduled an abortion for the morning of Wednesday, March 11, 1992, at a facility located in Monmouth County (see cert. of J.M. at 18a). After J.M. was unable to persuade V.C. to abandon her plans to terminate the life of the child, he retained counsel on Saturday, March 7, 1992 and instituted this action on Monday, March 9, 1992 (14a to 15a). J.M. certified to the court that he was prepared to raise the child himself, but at the same time recognized that once the child was born, V.C. may at that time change her mind and decide to be the primary custodian of the child. J.M. certified that he would not interfere with such wishes of V.C. nor would he contest to be the primary custodian if she made that choice. In the event V.C. changed her mind and chose to be the primary custodian, J.M. certified that he would live up to his obligations as father (whether they married or not) with financial support and visitation. The support J.M. offered V.C., therefore, included marriage, or in the alternative, his offer to raise the child alone or in combination with her, subject to her wishes (12a to 13a).

Counsel for V.C. has represented that V.C. obtained an abortion terminating the child's life shortly after the New Jersey Supreme Court Order of March 24, vacating an injunction entered by the Chancery Division. The child was 11 weeks old. Had an abortion not been performed the child would be a newborn infant at the time this brief was filed.

(ii) Facts Pertinent to the Question of Whether Human Life Begins at Conception and the fact that an Unborn Child can Experience Pain during an Abortion Even at Early Stages of Development.

The record contains eloquent and powerful testimony of Dr. Jerome LeJeune, M.D.[4] and Dr. Bernard Nathanson, M.D.[5] Their

[4] Jerome LeJeune, M.D., who submitted certifications to the court, is a world renowned geneticist currently teaching at the University of Paris, France. He has one of the largest consultation practices in the world for mentally retarded children with difficulty due to chromosomal mistake (examining over 2,000 children each year and maintaining records of 30,000 children over his lifetime) (see 32a to 35a). Among the many of his life's achievements includes Dr. LeJeune's discovery of Down's Syndrome and its causes due to an "excess of genetic material" consisting of the extra chromosome, known as No. 21. Dr. LeJeune has been credited with the first discovery of a chromosomal abnormality in man (see 34a to 37a). In his work Dr. LeJeune attempts to understand the nature of every human being and how and why they are inflicted by "constitutional difficulty" (35a) in an effort to find the means to correct the illnesses. As a result of Dr. LeJeune's prominence in the field of genetics, he was selected as a representative of France as a member of the United Nations

testimony and the extensive scientific discussion in Point I(B) of this brief explains new knowledge of science, technology and medicine which bear upon the factual and legal considerations in this case. It supports three separate and pertinent conclusions: (1) The life of a specific individual human being is a seamless continuum that begins at conception when the individual is a

Scientific Committee concerning the danger of atomic radiation. While serving on the Scientific Committee at the United Nations he also became Vice President of the United Conference in Moscow. In addition he was a member of the Pontifical Academy of Science and is a member of a special group that studied the damage of atomic war. He was requested by Pope John Paul II to travel to Moscow to speak with Mr. Brezhnev on behalf of the Vatican. He was the first to give a course on human genetics at the California Institute of Technology (35a to 37a).

[5] Dr. Bernard Nathanson, who also submitted certifications to the court, is an accomplished obstetrician and gynecologist from New York City, educated at Cornell University and McGill University Medical College in Montreal, Canada. He was board certified by the American Board of Obstetricians and Gynecologists in 1960 and is currently an attending obstetrician and gynecologist at St. Vincent's Hospital in New York; St. Luke's Roosevelt Hospital, part of Columbia University College of Physicians and Surgeons; and New York Hospital Cornell Medical Center. Dr. Nathanson has published numerous scientific articles and several books in the area of bioethics, fetal development, embryology and fetology. He lectures in these areas and holds professorships at two universities. Dr. Nathanson probably has more experience in abortion technology than anyone in the Country, having been the director of the largest abortion clinic in the United States for two years, his research and publications in medical literature, his scientific papers on the techniques of abortion and his study of complications of abortion related issues (53a to 58a).

complete, separate human being with all genetic material specifically programmed for all future development and growth; (2) The individual is complete not only as to species but the unique identity of the specific member of the human race is complete, immediately upon conception; and (3) There is new scientific evidence which supports the conclusion that the unborn child experiences pain even in the early stages of development, as early as eight weeks after conception (see discussion, Point I). Man's knowledge of science and medicine has advanced to the point where reexamination of the available information is required.[6]

C. PROCEDURAL HISTORY

1.

The petitioner, J.M., instituted this action seeking an injunction preventing V.C. from terminating the life of their child through an abortion. He brought the action on behalf of himself, asserting his own constitutional rights, which he expressly pleaded

[6] There is little doubt that the New Jersey Supreme Court is afforded a fair opportunity in this case to reach reliable conclusions concerning these matters. The plaintiff has compiled a discussion with proper authoritative citations, with the assistance of accomplished geneticists, biochemists and medical doctors [see Point I(B) at Pb. 32 to Pb. 73]. There is little doubt that the defendant V.C., has access to the medical community and can add anything pertinent to the inquiry.

included his right to protect the life of his child and his right to act as guardian ad litem of his child (to prosecute the child's individual rights).[7] The complaint was filed in the Chancery Division of the Superior Court of New Jersey on March 9, 1992 (1a to 8a). In support of an application for temporary restraints enjoining the abortion, the plaintiff-appellant submitted affidavits of J.M., Dr. Jerome LeJeune (a French geneticist) and Dr. Bernard Nathanson (a prominent New York Obstetrician and Gynecologist) (see 9a to 58a) and noticed the defendants V.C. and W.M.C. The Chancery Division entered the order enjoining the abortion until a return date of March 30, 1992 (see 59a to 63a).[8] On March 13, 1992, the Appellate Division of the Superior Court of New Jersey entered an Order directing the parties and the lower court to proceed using only the initials of the respective parties (reversing the Chancery Division's Order denying J.M.'s request to protect the identity of the parties) (see 64a). V.C., through counsel, moved to dismiss

[7] An action was also brought by the child through a guardian ad litem. The procedure in the child's case is discussed below at Pb. 8-13 to Pb. 13-7.

[8] The Order, as signed reflects the date of March 7th, a Saturday. See 60a. The actual date of the Order was Monday, March 9, 1992 at 3:35 p.m.

the Complaint of J.M. individually, and dissolve the restraints. On March 19, 1992, the Chancery Court granted V.C.'s motion to dismiss the Complaint brought on behalf of J.M. individually.

In dismissing J.M.'s individual case, the Chancery Court ruled that J.M. did not possess "standing" and had no right to act as Guardian Ad Litem (and "prosecute" the child's rights). The Chancery Court alluded to J.M. as a "busy body" who has "no standing to prosecute this action." (IT7-1 to 22; IT13-18 to 22; IT16-13 to IT17-7; IT20- 3 to 9; IT21-10 to IT22-7; see Order 65a).

Thus, the Chancery Court dismissed J.M.'s individual claim, which included his right to act as guardian ad litem for the child (to protect the child's rights), and his personal substantive constitutional rights.

After a timely motion for reconsideration was denied, J.M. filed a timely Notice of Appeal in the Appellate Division of the Superior Court of New Jersey (see Notice of Appeal, 93a to 101a).[9] The Appellate Division affirmed the March 19 Order of

[9] The Notice of Appeal filed by J.M., individually, identified all of the issues raised on this appeal including, among others:

1. The unborn child of J.M. and V.C. is, as a matter of fact and law an individual member of the human race to whom

the Chancery Division on September 21, 1992, in response to the defendant's Motion for Summary Affirmance (see Order, 80a), while granting the plaintiff's Cross Motions including those to accelerate the disposition of the motion, and to supplement the record (see, Order, at 81a). The plaintiff-appellant filed a timely Notice of Appeal in the New Jersey Supreme Court on Monday, November 2, 1992 (see, 102a to 109a).

2.

(a)

constitutional rights under State and Federal law are extended. The unborn child is an individual member of the human race from the moment of conception.

2. J.M. individually has a right under both the State and Federal Constitutions to defend life which includes the life of his unborn child (N.J. Const. Article I, Section I).

3. J.M. individually has the standing to litigate the unborn child's substantive rights.

4. Included in the rights of the unborn child is the child's right to have one or both of his parents to assert his or her rights.

5. J.M. individually possesses a right to raise the legal rights of his children, including a child who is unborn.

6. The unborn child enjoys constitutional protection under the due process clause of the Fourteenth Amendment of the United States Constitution and under Article I, Section I of the Constitution of the State of New Jersey.

7. If the state has a compelling interest in protecting the life of an unborn child, then the child's father has an interest and corresponding right to protect that same life.

This appeal relates only to J.M.'s individual standing to prosecute the action on behalf of his child, raise the child's rights and his own individual rights. However, there was a separate procedure for the related case of the child, allowed by the Chancery Division to be brought by the child (through a guardian). The disposition of the child's case does not bear upon the right of J.M. to prosecute this appeal, or the jurisdiction of the New Jersey Supreme Court to decide it. The Appellate Division exercised its jurisdiction on J.M.'s individual appeal, and the defendant's admit that court possessed jurisdiction.[10] J.M. relates the procedure in the child's action only for the sake of clarity and completeness.

(b)

On March 19, 1992, when the Chancery Division dismissed J.M.'s individual claim on the basis that he had no standing to prosecute the child's action, (or other rights) the court denied V.C.'s motion to dismiss the complaint of the child (see Order, 65a). The Court intended to allow the child's claim to proceed by a guardian who the Court maintained had to be appointed by the

[10] V.C. argued that a higher court could not hear J.M.'s individual case because the Appellate Division had jurisdiction. J.M. also agreed that the Appellate Division had jurisdiction. See discussion below at Pb. 12-11 to Pb. 13-6.

Court, the father lacking a "right" to serve in that capacity (IT7-21; IT21-8, 9). The Court stated that he intended (no order was signed or entered) to appoint a guardian, and that he "would probably" appoint J.M. (IT20-3 to 9; IT56-20, 21). The Court ruled that J.M. had no rights including the right to act as guardian.

(c)

When the Chancery Judge denied V.C.'s motion to dismiss the child's complaint on March 19, he continued the restraints (Order, 65a; IT51-2 to IT53-19). The Court, declared a need to resolve the question of "when life begins", stating that a resolution of that question is a prerequisite to determine whether the unborn child enjoys constitutional rights, and observed that the courts in New Jersey have been called upon to make the difficult determination in defining when life ended (in the "right to die" cases) (see IT44-7 to 17; IT45-9 to 15).

V.C. immediately filed a motion with the Appellate Division seeking: (1) leave to appeal from the order of the Chancery Division refusing to dismiss the child's Complaint and summary reversal; and (2) dissolution of the Chancery Division's restraining order. The plaintiff, J.M. individually, filed a cross-motion seeking leave to appeal the interlocutory order of the Chancery Division

dismissing his Complaint. On March 23, 1992, the Appellate Division (Judge Shebell dissenting) granted V.C.'s motion for leave to appeal the injunction only and summarily reversed the Chancery Division, vacating the restraints. That court denied V.C.'s application for leave to appeal the Chancery Division's refusal to dismiss the guardian's complaint. J.M.'s motion for leave to appeal the dismissal of his individual complaint was denied. J.M.'s individual claim was never reviewed on the merits. The majority relied upon the U.S. Supreme Court rulings in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705 (1973) and *Planned Parenthood v. Danforth*, 428 U.S. 52, 96 S.Ct. 2831 (1976) (see 66a to 70a).

In his dissent, Judge Shebell explained that he would not have vacated the restraints and would have reversed the Chancery Division's dismissal of J.M.'s individual complaint, stating:

> "The law pertaining to abortion is in a state of flux. See *Webster v. Reproductive Health Services*, 492 U.S. 490, 106 L.Ed.2d 410 (1989); *Planned Parenthood of S.E. Pa. v. Casey*, 947 F.2d. 682, 695, 698 (3rd Cir. 1991). The United States Supreme Court's holding in *Roe v. Wade*, 410 U.S. 113, 35 L.Ed.2d 147 (1973), in the view of many, represents erroneous interpretation of the Constitution -inventing a constitutional right to an abortion, now exclusively in the mother....In this case, one of the recognized parents cries out for the right to "preserve" and thereafter "nurture" the child which the other seeks to irretrievably put beyond the reach of all courts. *Cf. Planned Parenthood of Cent. MO. v. Danforth*,

428 U.S. 52, 49 L.Ed.2d 788 (1976)...The courts...perhaps even because of this very case, may recognize an unborn child's right to life, or at least, the right of both parents to be heard on the issue. I would, therefore, continue the restraints wisely imposed by the trial judge..." (see 69a to 70a).

The Appellate division stayed its own order to permit both parties to be heard before the New Jersey Supreme Court the following day, March 24, 1992. As a result of the orders of the Appellate Division, the Complaint of the child was left undisturbed. The child, by a guardian (unappointed, but designed as J.M.), filed a motion in the New Jersey Supreme Court seeking leave to appeal from the interlocutory order of the Appellate Division dissolving the restraints. J.M. individually moved for leave to file an interlocutory appeal from the dismissal of his complaint. V.C. moved before the New Jersey Supreme Court seeking an Order granting leave to file an appeal from the interlocutory order denying a dismissal of the complaint of the child by the guardian. That Court granted leave to V.C., and summarily reversed the trial court, dismissing the complaint brought by the child (see 71a to 72a).

The Supreme Court declined to grant leave to J.M. individually (73a, 74a). The claim of J.M., individually was at that point never heard beyond the Chancery Division, including his rights to defend

the life of his child, act as guardian and protect the child's rights. The following day, March 25, 1992, the single Justice Applications for a Stay of the New Jersey Supreme Court orders were denied by Justices Souter and Thomas (76a, 77a).

(d)

The child, by its guardian, filed a Petition for Certiorari in the United States Supreme Court (the petition, two supplemental briefs of J.M., and two reply briefs of J.M., all filed in the Supreme Court of the United States were made part of the record in the Appellate Division of the Superior Court on J.M.'s individual appeal). J.M., always acknowledging that his individual case was pending in the Appellate Division, also filed a Petition in the United States Supreme Court. V.C. agreed and argued that J.M.'s individual claim was pending in the Appellate Division.[11] The fact that J.M.'s case was pending in the Appellate Division was never in dispute but the legal question, under federal law, of whether the United States Supreme Court could take jurisdiction, despite that fact, was in dispute.[12] The Supreme Court of the United States

[11] See part of V.C.'s Brief at 110a to 112a.

[12] See part of V.C.'s brief at 110a to 112a. See part of J.M.'s Reply Brief at 113a to 115a.

denied both petitions, thereby ending the child's case. J.M.'s appeal to the Appellate Division of the Superior Court of New Jersey was affirmed on the merits on September 21, 1992. That case is now properly before the Supreme Court of New Jersey.

D.

JUSTICIABILITY

1.

Although the defendant represents that the child's life has been terminated, this case still presents a justiciable controversy. Based upon the principles annunciated by the U.S. Supreme Court in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705 (1973), the case presents a justiciable controversy because V.C. was pregnant at the time the complaint was filed and for sometime thereafter. If a woman is pregnant at the time of the filing of a complaint, the "termination" of the pregnancy does not render the case moot where the issue pertains to the pregnancy. *Roe*, 410 at 124, 125, 93 S.Ct. at 712, 713. In *Roe* the court concluded that pregnancy litigation provides a classic justification for a conclusion of non-mootness because it truly presents a situation that is "capable of repetition, yet evading review". *Roe v. Wade* at 410 U.S. at 124, 93 S.Ct. at 712.

The *Roe* court was able to create the law concerning abortion only because of this rule of appellate review. The plaintiff in *Roe* was not pregnant at the time of the hearing on the trial in May of 1970, almost three years before the Supreme Court of the United States issued its opinion in the case. *Roe*, 410 U.S. at 127, 93 S.Ct. 712. The court observed that:

> "if...termination (of pregnancy) makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage and appellate review will be effectively denied."

Roe, 410 U.S. at 125, 93 S.Ct. at 713. *Roe*, therefore created the criteria for cases dealing with abortion law. That rule must be applied here, or *Roe* itself could never be effectively reviewed. The defendant in this case has consistently declined to challenge this point during the appellate process in the Appellate Division as well as the filing in the United States Supreme Court on the child's petition.

2.

By the precedent established in *Roe v. Wade*, and, inferentially, for the same reasons J.M.'s appeal is not moot, the New Jersey Supreme Court has jurisdiction over issues relating to the entire nine months of pregnancy. J.M. argues the rights of the child, and his right to defend the child at all stages of development

from conception to birth. This case presents, perhaps, the first and maybe the last opportunity for the New Jersey Supreme Court to resolve these compelling issues in the context of a civil case, including the question of whether the child possesses rights prior to birth (at all stages or any particular stage). This point was made clear when the majority in *Roe* created very precise rules of law governing all stages of the child's development despite the fact that the pregnancy in that case had terminated before May 22, 1970 and the complaint was filed in March only two months earlier. The majority rejected the argument of the dissent that the Court should not review all nine months of the pregnancy. Justice Rehnquist had argued that there was no evidence that the child was ever at most stages of development during the proceeding of the litigation (only two months) and objected that the court created law pertaining to those stages of development nonetheless. See Rehnquist, J. Dissenting, 410 U.S. 171, 172, 93 S.Ct. at 736. The majority totally rejected this objection of the Dissent.

It would seem obvious that the rules of justiciability employed to create the right of a mother to terminate the life of her child must also apply to the challenge by the child and the child's father in asserting their rights and a review or reexamination of the law

delineating the respective right. J.M. observes that no case such as this, where a father seeks to assert his right to protect his child, by asserting the child's rights, has ever been reviewed by this court or the United States Supreme Court. Unlike all cases subsequent to *Roe*, this one does not pit the rights of a woman against the poorly defined right of a state. Rather, it places the rights of a child and a father's right to prosecute those rights against the power of a state which authorizes the taking of the child's life. Because of the clear state action, the quality of the record, and the fact that the case squarely presents questions never before decided by this Court, this case is perhaps the best opportunity for this court to decide the substantial questions of importance for the people of this state.[13] No other entity can determine whether a child possesses rights prior to birth under our state constitution.

POINT I

RECENT SCIENTIFIC, MEDICAL AND TECHNOLOGICAL ADVANCES AND DISCOVERIES PROVIDE A LARGE BODY OF NEW FACTUAL DATA AND INFORMATION WHICH SUPPORTS THE CONCLUSION THAT: (1) THE CHILD

[13] Similar questions are presented in the context of a quasi-criminal municipal court case in ***State v. Alexander Loce***, currently pending in the Appellate Division.

EXPERIENCES PAIN PRIOR TO BIRTH EVEN IN THE VERY EARLY STAGES OF DEVELOPMENT AND (2) THE LIFE OF A HUMAN BEING BEGINS AT CONCEPTION. THERE IS A CONSENSUS WITHIN THE SCIENTIFIC AND MEDICAL COMMUNITIES CONCERNING THE CRITICAL BIOLOGICAL AND GENETIC FACTS WHICH SUPPORT THE CONCLUSION THAT THE LIFE OF A PERSON BEGINS AT CONCEPTION. THESE FACTS, ARE RELEVANT TO THE QUESTION OF WHETHER A CHILD POSSESSES RIGHTS PRIOR TO BIRTH UNDER THE CONSTITUTION OF THE STATE OF NEW JERSEY AND THE NEW DATA AND INFORMATION REQUIRES A REEXAMINATION OF THE LEGAL QUESTION OF WHETHER AN UNBORN CHILD POSSESSES RIGHTS UNDER THE FOURTEENTH AMENDMENT.

A.

THE RELEVANCE OF THE FACTS AND NEW TECHNOLOGIES.

J.M. asserts his right and standing to prosecute his child's action. The legal analysis which concludes that his child enjoys constitutional rights prior to birth under both the constitution of the State of New Jersey and the Fourteenth Amendment of the Constitution of the United States rests upon the fact that the life of a human being begins at conception and is a complete and separate human being at every stage of development. It is also relevant to the legal question that the child is capable of experiencing pain prior to birth even at the early stages of development.

1. THE STATE RIGHTS.

Independent of the federal issues, the question of whether the child has rights after conception and prior to birth [or J.M. has his own individual rights] under the State Constitution is a question of first impression (in the abortion context) for the Supreme Court of New Jersey to determine. The question of whether the child [and J.M.] enjoys rights before birth but after viability is a state question free of any Federal Restraint. *Roe v. Wade*, 410 U.S. 113, at 164, 165, 93 S.Ct. 705 at 732 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, ___ U.S. ___, 112 S.Ct. 2791 at 2804, Slip Op. at 4 (1992).

This inquiry is of importance because the State of New Jersey licenses doctors, health professionals and medical institutions and specifically authorizes medical procedures designed to terminate the life of a child right up to the moment of birth.

In 1978 New Jersey Repealed N.J.S.A. 2A:87-1 which made abortion a high misdemeanor. In doing so it removed all prohibition against a mother seeking to take the life of her child. New Jersey, in licensing its physicians, involved itself in the offensive conduct, and specifically gave them authority to terminate the life of a child before birth. New Jersey licenses and regulates doctors and

hospitals through the Board of Medical Examiners. New Jersey's Administrative Code states that only a physician licensed by the state may perform an abortion. Reg. of Bd. of Med. Exam. 13:35-42(b) (Termination of Pregnancy).

The regulations of the doctors specifically and affirmatively authorize abortions anytime prior to birth. Even between 20 weeks gestation and actual birth the only limitations placed upon an abortion is that the doctor must request from the State Board permission to perform a "D and E" procedure (always fatal to the child)[14] in a licensed ambulatory care facility. N.J.A.C. 13:35-4.2(g). The physician, in order to obtain such permission, need only show he or she has the proper training.

The state has created rules by which it literally licenses individuals to take the life of a child anytime prior to actual birth. This specific licensing and regulation, together with repeal of all prohibitions against abortion, constitutes the creation of rules of a legal framework by which a child's life can be taken after viability.[15]

[14] See, *Planned Par., Kansas City v. Ashcroft*, 462 U.S. 476, 483, 103 S.Ct. 2517, 2521.

[15] See also, discussion on state action, Point VI, below.

2. THE FEDERAL RIGHTS.

(a) *Introduction - The Legal Principles Set Forth in Roe Concerning the Rights of the Child Prior to Birth.*

In *Roe v. Wade* the United States Supreme Court concluded that Texas' imposition of criminal penalty for abortions was not justified based upon that "state's determination to recognize and protect prenatal life from and after conception (constituting) a compelling state interest." *Roe* decided that a State's interest in protecting the life of an unborn child is compelling only in the third trimester of pregnancy. 410 U.S. at 163 S.Ct. at 732.

The underlying basis for the *Roe* Court's conclusion was the premise that in 1973 it was not possible to determine when life begins.

To this day *Roe* is the only case in which the United States Supreme Court reviewed that issue.[16] However, significant recent developments and discoveries in science and medicine require a thorough re-examination of Section IX(A) and IX(B) of

[16] In the recent case of *Planned Parenthood of S.E. Pa. v. Casey*, U.S. ___, 112 S.Ct. 2791 (1992) the Court reexamined *Roe* on many issues including the rights of the mother. *Casey* did not review Section IX(A) and IX(B) of *Roe* dealing with the fundamental question of whether the child had rights. *Casey* left this question open.

Roe v. Wade.[17] The conclusion of the Supreme Court that a state's interest in protecting prenatal life was compelling at one stage but not at another involved two general inquiries that were separate yet inextricably connected: (a) whether the Fourteenth Amendment provided a child Federal constitution protection prior to birth under the Due Process clause; and (b) when does the life of a human being begin. Because the court felt unable to determine, in 1973, when life began, the court declined to extend rights to the child before birth. Two important statements that were made now require scrutiny:

> (1)"...The word 'person', as used in the Fourteenth Amendment, does not include the unborn." 410 U.S. at 158, 93 S.Ct. at 729; (2) we need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." 410 U.S. at 159, 93 S.Ct. at 730. (emphasis added)

(b) *Whether The Child Has Constitutional Rights is a Mixed Question of Fact and Law.*

The question of whether an unborn child is a person who enjoys constitutional rights under the Fourteenth Amendment is a

[17] 410 U.S. at 156-162, 93 S.Ct. at 728-731.

legal one, but one which includes an important factual component. Science and medicine are currently able to provide data and information pertinent to the factual considerations far beyond that contributed in 1973. The legal inquiry, simply put, is whether the human life with which we deal does or should enjoy rights under the Fourteenth Amendment at any or at all stages of development between conception and birth (recognizing that children who survive birth range in age from twenty-three weeks to forty weeks post conception). By suggesting that science and medicine can establish when the biological life of a person begins is not to suggest that the court should defer to science. The ultimate judgment, being a legal one, must be arrived at in consultation with science. By reaching a legal conclusion concerning which human beings, and at what age of development, enjoy constitutional rights the court makes the judgment of when life begins because the practical consequences of the judgment necessarily include the factual considerations.[18] This judgment

[18] While we sincerely empathize with the sentiments expressed by Justice Scalia in his concurring opinion in *Cruzan v. Director, Missouri Department of Health*, 110 S.Ct. 2841 at 2859 (1990), there are certain issues, even concerning life and death, that only the nine justices of the United States Supreme Court or the seven Justices of the Supreme Court of New Jersey have the power to

is made by default, in the absence of a determination. Expressly stated or not, that is really the motivating force which gave birth to the trimester formula: what we knew weighed against what we were not sure of.

There can no longer be serious doubt about when the life of a human being begins (see Point I Section B(2) and Appendix B.) That some members of the scientific community might postulate that there is no consensus on when life begins, indeed some have so stated to this Court, does not contradict the reliability and wide spread acceptability of the relevant scientific information.[19] Based upon the scientific factual data the human is biologically complete at conception.[20] That some scientists personally prefer to give that human life no value expresses a view which does not lie within their domain and it merits no more consideration than the

determine, the only consolation being that the rest of us will bring to them their thoughts, abilities, arguments and knowledge. When a state completely fails to protect the life of a human being, affirmatively acts to terminate that life, even a human being yet born, and that state's act results in a painful, brutal death of a member of the human race there is nowhere left to appeal but the New Jersey Supreme Court on the state constitutional issues (and the United States Supreme Court on the federal issue).

[19] See discussion Point I(B)(2)(b).

[20] See, Point I(B)(2)(a)(b) and Appendix B at xva attached.

view of those from non-scientific disciplines. The value judgments of political entities cannot deprive an individual human being his natural and unalienable right to life.[21]

When human life begins is truly a legal question. It is a legal question that encompasses factual questions scientific and medical in nature, as well as ethical and moral concerns. It is the promise of the law, especially constitutional law, to balance the relative harms conduct has on individuals. Legal questions often encompass these moral and ethical considerations. Oliver Wendell Holmes once observed:

> "The law is a witness and external deposit of our moral life. Its history is the history of the moral development of the race."[22]

(c) *The Inability of the Roe Court to Reach a Conclusion on the Factual Component of the Inquiry Before it Lead to a Wholly Different Legal Analysis than that Required if the Court Found, as a Matter of Fact, that Life Begins at Conception or Prior to Birth.*

If the *Roe* Court had the benefit of man's current knowledge it would have concluded that the life of a human being begins at

[21] See Point II.

[22] Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 *Harvard Law Review*, 457 (1897).

conception, and a child is capable of experiencing pain prior to birth and as early as eight or nine weeks gestation.[23] This conclusion compels the type of legal analysis discussed in Points II through V of this brief. Because the court felt unable to arrive at an answer to the factual aspect of the question, the legal analysis performed by the *Roe* court was very different from, and quite irrelevant to, the one the court must do once the court has found that life begins at conception.

The *Roe* court found that it was "persuaded" that the word "person" "as used in the Fourteenth Amendment" did not include the unborn. 410 U.S. at 158, 93 S.Ct. at 729. To reach this statement the court primarily relied upon a review of those clauses in which the word "person" appeared. This approach becomes irrelevant when it is recognized that life begins at conception (or any stage before birth) for a number of reasons. For one thing, it would have to ignore the equal protection clause of the Fourteenth Amendment. Two clauses that the court noted as containing the word "person" were the Fifth Amendment Due Process Clause and Article IV, §2, clause 3 (fugitive slave clause). The Fifth

[23] See discussion, Point I(B).

Amendment extends due process to any "person." The fugitive slave clause applied the term "person" to individuals who did not enjoy liberty within the slave states. It would appear that the term when used in Article IV, ratified in 1787, and the Fifth Amendment Due Process Clause, ratified in 1792, was an all inclusive term because it included natural persons who enjoyed constitutional protections and natural persons who did not enjoy liberties but were subject to slavery laws.

However, in determining whether the word "person" as used in the due process clause, which was ratified in 1868, could have been intended to include some classes of human beings but not others (which is what the *Roe* court would have to infer if it concluded that life began before birth as a matter of fact) the court should have construed the due process clause in *pari materia* with the equal protection clause (introduced to the constitution for the first time in the Fourteenth Amendment). The equal protection clause forbids denial to "any person within its jurisdiction" the equal protection of the laws. To suggest that the word "person" as used in the equal protection clause (and therefore the due process clause) could contain classes of "persons" and that the clause would apply to some but not to others, would constitute an

inherent contradiction which would render the equal protection clause totally meaningless and without consequence. Therefore, any legal inquiry into the legal question of whether the Fourteenth Amendment protects an unborn child (and the meaning of the word "person") can only be conducted simultaneously with the *Roe* court's inquiry under Section IX(B), when the life of a human being (the life of a person) begins.

Secondly, *Roe* ignored prior precedent of the United States Supreme Court which specifically found that a corporation was a "person" which enjoyed liberty rights under the Fourteenth Amendment. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). *Grosjean* has relevance here in three separate ways. First, a corporation no more meets the *Roe* test for a "person" than does a child prior to birth. The only difference was that the Supreme Court in *Grosjean* had to acknowledge the existence of a corporation, where the *Roe* court felt it could not recognize the existence of the child based upon "man's knowledge" in 1973. "Existence" becomes the most pertinent question.[24] No theory of individual rights could justify inclusion of the legal fiction of a

[24] See discussion Point II(B).

corporation as a "person" and deny a child's existence based upon the current state of scientific and medical knowledge. Second, *Grosjean* has precedental value on the issue of *stare decisis* to overrule *Roe* (in excluding children prior to birth) because *Grosjean* specifically construed the same word ("person") in the same due process clause and overruled prior cases which excluded corporation as "persons" who enjoyed liberty interests under the due process clause. See, *Northwestern Life Insurance Co. v. Riggs*, 203 U.S. 243, 255 (1907); *Western Turf Association v. Greenberg*, 204 U.S. 359, 363; *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571 (1925). *Grosjean* is specific precedent of the United States Supreme Court which expanded the class of "persons" to whom the due process clause applies.

Third, *Grosjean*,as well as all of the other cases of the U.S. Supreme Court which dealt with the rights of corporations under the fourteenth amendment, specifically found that a corporation, although it was not a person under the citizenship clause contained in the first sentence of that amendment because it was not "born" or "naturalized", was a person which enjoyed rights under the due process clause. It cannot be said, therefore, that birth is a requirement of persons under the due process clause.

The real issue, all of this points out, is that *Roe* is built upon the worst form of contradiction: corporations are created by government, yet the court holds that Due Process cannot be withheld from them; individual human beings, whose lives and existence are created independent of government, owing nothing to government concerning the gift of life itself, the court has withheld from some the recognition of the unalienable right to live.[25]

(d) *The Question of the Child's Rights is the Sort of Mixed Question of Fact and Law Which, by Accepted Principles of Stare Decisis, Requires a Reexamination and Overruling of Prior Precedent (Roe) When New Facts, or New Appreciation of Old Ones, Demonstrate that Prior Precedent Erroneously Applied Constitutional Principles.*

Stare decisis is not a bar to the reexamination which we urge when new facts, or new appreciation of old ones, justify it. Our research has disclosed one hundred and seventy-four instances in which the United States Supreme Court has overruled, in whole or in part, its previous constitutional decisions.[26]

[25] See discussion Point II(B).

[26] The present compilation of the 174 cases noted is based primarily upon the following authoritative sources: Justice Brandeis, dissenting in *Burnett v. Coronado Oil and Gas Co.*, 285 U.S. 393, 406-409 n1. (1932); *Annette E. Wilson "Stare Decisis"*

Of particular relevance here is the now classic and often cited statement of Justice Brandeis contained in his dissenting opinion in *Burnett v. Coronado Oil and Gas Co.*, 285 U.S. 393, 405-413. Justice Brandeis there stated, in pertinent part:

> "The reasons why this court should refuse to follow an earlier constitutional decision which it deems erroneous are particularly strong where the question presented is one of applying, as distinguished from what may accurately be called interpreting, the Constitution...The controversy is usually over the application to existing conditions of some well recognized constitutional limitation. This is strikingly true of cases under the due process clause when the question of whether a statute is unreasonable, arbitrary or capricious; of cases under the equal protection clause when a question is whether there is any reasonable basis for the classification made by a statute;...In every such case the decision, in the first instance, is dependent upon the determination of what in legal parlance is called a fact, as distinguished from the declaration of a rule of law. When the underlying fact has been found, the legal result follows inevitably. The circumstances that the decision of that fact is made by a court instead of by a jury, should not be allowed to obscure its real character." 285 U.S. at 410, 441.

Quo Vadis? 33 Geo. L.J. 251, 254 n. 17 265(1945); William O. Douglas "stare decisis" 49 Colum. L.Rev. 735-743, 756-758(1949); Albert R. Balustein and Andrew H. Field, Overruling Opinions in the Supreme Court 57 Mich. L.Rev. 151, 184-194(1958); The Constitution of the United States of America: Analysis and Interpretation, 1317-18, Lester S. Jayson, et al. ed. (1973). Payne v. Tennessee, Marshal, J., dissenting, 111 S.Ct. 2597, 2610, 2611 n.1 (1991). For the complete list of cases, see the Appendix A immediately following this Brief.

The question of whether an unborn child is a person to whom the Fourteenth Amendment should be applied is a mixed question of fact and law, and is precisely the type of determination, when man's knowledge becomes more extensive, of which Justice Brandeis speaks. The Brandeis analysis has been frequently cited with approval. See *Solorio v. U.S.*, 107 S.Ct. 2924, 2999 (1987) (expressly overruling *O'Callahan v. Parker*, 395 U.S. 250 (1969)); *United States v. Scott*, 98 S.Ct. 2187, 2199 (1978). *Webster v. Reproductive Health Services*, 492 U.S. 490, 109 S.Ct. 3040, 3067 (1989) (Blackman, J., dissenting).

In reaffirming that portion of *Roe v. Wade* which found that the Due Process Clause of the Fourteenth Amendment "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy," *Roe*, 410 U.S. at 153, 93 S.Ct. at 727, the Court in *Casey*, expressly declined to state that *Roe* was

correctly decided either on constitutional principles[27] or moral grounds,[28] and articulated a reluctance to do so.[29]

The Court, not being able to affirm either *Roe's* correctness or its morality, preserved a mother's right based upon *stare decisis* and special considerations because of a divisive national debate. Whether or not the principles outlined in *Casey* operate as a bar to overturning the mother's rights found in *Roe*, they clearly are not a bar in the JM case on the question of his standing to prosecute the child's rights.[30]

[27] "We do not need to say whether each of us, had we been Members of the Court when the valuation of the State interest came before it as an original matter, would have concluded, as the *Roe* court did, that its weight in insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions. The matter is not before us in the first instance, and coming as it does after nearly twenty years of litigation in *Roe's* wake we are satisfied that the immediate question is not the soundness of *Roe's* resolution of the issue, but the precedental force that must be accorded to its holding." *Casey*, ___ U.S. ___, 112 S.Ct. at 2817, Slip Op. at 29.

[28] "Some of us as individuals find abortion offensive to our most basic principles of morality,..." (*Casey*, ___ U.S. ___, 112 S.Ct. at 2806, Slip Op. at 8).

[29] *Casey*, Slip Op. at 11; Slip Op. at 19, 112 S.Ct. at 2808; 112 S.Ct. at 2812.

[30] Discussion related to the *stare decisis* issue are found here, under Point IV(A) and Point VII below. This present treatment is only in the context of the relevance of the new technologies and

JM relies upon Justice Brandeis' analysis in his dissent in *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405-413 (1932) cited by the Joint Opinion in *Casey*, 112 S.Ct. 2809, Slip Op. at 12, as providing the kind of reasons which would justify overruling *Roe*.

Two critical distinctions made by Justice Brandeis apply here. First, where the Due Process Clause has been erroneously *applied* (as opposed to erroneously interpreted), overruling the prior decision is more easily justified. That principle has application here because the problem is not one of interpretation (clearly the Due Process Clause textually affirms the right to life of all persons), but rather one of applying a recognized right to a specific circumstance. Secondly, Justice Brandeis distinguishes those legal questions which are by their nature mixed questions of fact and law. The legal question of whether the unborn child enjoys constitutional rights is such a question.

The enormous technological advances since the time of *Roe* have discovered facts and data which support the conclusion that the unborn child experiences pain in the third trimester, and as

scientific and medical data.

early as the first trimester. (See Point I(B)(3)(b) at Pb. 53 to Pb. 73.) The new technology has also developed techniques resulting in discoveries which conclusively establish that the biological life of a human being begins at conception. (See Point I(B)).[31]

The Joint Opinion likens *Brown v. Bd. of Ed.*, 347, U.S. 483 (1954) to the type of case referred to by Justice Brandeis. *Casey* observed that the facts which controlled the *Brown* ruling were the same at the time of *Plessy v. Ferguson*, 163 U.S. 537 (1896) which *Brown* overruled, but the *Plessy* court either did not understand them, or the justices, for one reason or another, did not recognize them. *Casey*, 112 S.Ct. at 2812, 2813, Slip Op. at 20, 21. *Casey* explains:

> While we think *Plessy* was wrong the day it was decided, see *Plessy, supra*, at 552-564 (Harlan J. dissenting), we must also recognize that the *Plessy* court's explanation for its decision was so clearly at odds with the facts apparent to the court in 1954 that the decision to examine *Plessy*

[31] "Viability" is irrelevant to both general inquiries. The child is never "independent" in the sense that she is free from dependence on others for nourishment and protection. "Viability" does not change this fact. The child, however, is "independent" from the moment of conception in the sense that the child is a separate, complete and unique human being. Viability is only a stage of development no more significant than any other, not a moment defining "essence." See discussion and authorities below at Pb. 81-18 to Pb. 85-6.

was on this ground alone not only justified but required. *Casey*, 112 S.Ct. at 2813, Slip Op. at 21.

These observations have special application to the JM case. Whether or not the *Roe* court believed that it could not determine when the life of a human being began, no one could, in light of the present evidence, dispute that the biological life of a complete, separate and individual human being begins at conception. (See discussion Point I(B) and Appendix B at xva to xxiia).

The comments made by *Casey* concerning the *Plessy* decision have equal application to *Roe*. One can imagine that if *Roe* is overruled by J.M. on the question of the child's rights, that *Casey's* statement could be reprinted with small modification to read:

> "society's understanding of the facts upon which a constitutional ruling was sought in 1992 (JM) was thus fundamentally different from the basis claimed for the decision in 1973 (Roe)". 112 S.Ct. at 2813, Slip Op. at 21.

Roe resembles *Plessy* more than *Brown*; and *Brown* would more resemble JM. To the observations of the dissent concerning the differences between *Brown* and *Roe* we add that *Roe* does not

possess the moral force of *Brown*.[32] Although both decisions met with disapproval, twenty years after *Brown* was decided no *responsible public official* would publicly state that the decision was not based upon sound moral and legal grounds. Twenty years after *Roe* it is apparent that the force of disagreement is driven by the fact that the decision is not based on solid moral or legal grounds. *Roe* shall never command the respect that *Brown* has. *Brown* corrected a wrong, *Roe* created one.

B.

RECENT SCIENTIFIC, MEDICAL AND TECHNOLOGICAL ADVANCES AND DISCOVERIES PROVIDE A LARGE BODY OF NEW FACTUAL DATA AND INFORMATION WHICH SUPPORTS THE CONCLUSION THAT: (1) THE LIFE OF A HUMAN BEING BEGINS AT CONCEPTION AND (2) THE UNBORN CHILD EXPERIENCES PAIN DURING ABORTIONS EVEN IN THE EARLY STAGES OF DEVELOPMENT. THERE IS A CONSENSUS WITHIN THE SCIENTIFIC AND MEDICAL COMMUNITIES CONCERNING THE CRITICAL BIOLOGICAL AND GENETIC FACTS WHICH SUPPORT THE CONCLUSION THAT THE LIFE OF A PERSON BEGINS AT CONCEPTION.

1. Introduction: The Exploding Revolution of Molecular Biology Has Changed Man's Knowledge of Developmental Neurology.

[32] Also, *Brown* was the product of an unanimous court acting to implement that which was just and moral. *Casey's* call for acceptance of *Roe's* unjust and incorrect ruling is made by three justices of a badly divided Court.

Biologically, human beings are made up of molecular building blocks. Their development is controlled by the genetic material DNA and RNA. The instructions that can be found in this genetic material are carried out by the synthesis and functioning of proteins. Recent advancements in science mean, in practical terms, that the scientific investigator can now ask at the molecular level, using recombinant DNA technology[33] and monoclonal antibody technology,[34] if the instructions (made up of DNA and RNA) to make a particular protein exist and also if that instruction has been transcribed (read). Furthermore, the scientist can determine if a specific protein has indeed been produced from specific genetic instruction.[35] These scientific techniques, combined with immunochemistry technology, can be used to show that a particular protein is present in a specific sample; and when

[33] Watson, J.D.; Tooze, J.; and Kurtz, D.T. *Recombinant DNA: A Short Course*. San Francisco: W.H. Freman, 1983.

[34] Campbell, A.M. "Monoclonal Antibody Technology" In *Laboratory Techniques and Biochemistry and Molecular Biology*, edited by R.H. Burdon and P.H. Van Knippenberg. Eisevier (Amsterdam), 1985.

[35] Martinis, J.; David, G.S.; Bartholomew, R.M.; and Wang, R. "Novel Applications of Monoclonal Antibodies." In *Basic Biology of New Development* In *Biotechnology* In *Basic Life Sciences* 25(1983): 129-154, at p. 129.

this is combined with an appropriate visualization technique, the location of the protein in the sample can be determined.[36] In

[36] Since the *Roe* Court commented upon the then current knowledge of mankind in 1973, there have been many scientific, medical and technological advances and discoveries, many in the last five years. These include the following: (1) Recombinant DNA Technology (methodology which among other things) allows the product of a large amount of specific pieces of DNA which assists in DNA probe research); (2) DNA Probe Technology (use of pieces of DNA that are radioactively labeled to find a piece of DNA or RNA that is related in sequence. Among any other uses, it is a method which identifies the DNA or RNA that codes for "Substance P"); (3) Southern Blot (the technology that combines the separation of molecules by electric charge and size with DNA probe technology); (4) Northern Blot (the technique that combines the separation of molecules by electric charge and size along with RNA probe technology for DNA); (5) DNA Mapping (the process by which a map is made with guide posts of the DNA available in a particular sample (including chromosomes). The mapping is often accomplished by cutting the DNA molecule into pieces and then determining from where the pieces were derived); (6) DNA Finger Printing (a procedure first demonstrated in 1985, whereby DNA probes to minisatellite regions of human DNA are used to provide a complex Southern Blot pattern. The procedure is finding increased usefulness in forensic science and legal medicine as it provides a test for relatedness between samples of DNA (extracted from human tissue). Used in conjunction with the PCR technique such comparisons can be done on as little as one cell from each source; (7) Polymerase Chain Reaction (PCR) (PCR - a test-tube method of amplifying DNA sequences hundreds of millions to billions of times invented in late 1984 and 1985 and can be used to obtain information from a single cell); (8) Monoclonal Anti-Body Technology (antibody preparation which contains only single type of antibody molecule); (9) Hybridona Technique (used to produce human specific antibodies and in the detection of Substance P and other human proteins or peptides); (10) Flow Cytometry (a technique by which cells in suspension, often marked with fluorescent monoclonal antibodies are intercepted by a beam of

1973 most of our knowledge concerning human identity and development before birth was based upon gross morphological observations and biochemical studies on often heroic quantities of material. An example would be in a case where a scientist would

light (a laser is often used) the interaction produces signals which drive a cell sorting apparatus which sorts and counts cells based upon a desired property. The technique is being used to completely remap the nervous system and for prenatal diagnosis with fetal cells isolated from maternal blood); (11) Improved Ultrasound Technology (vastly superior technology which permits observation of the fetus at early ages of gestation); (12) DNA Methylation (modification of DNA so that it is recognized as different); (13) Fetal Heart Monitoring (device which creates the ability to observe the operation of the human heart of the fetus at early stages of development); (14) DNA cloning (the application of deoxyribonucleic acid (DNA) techniques to prenatal diagnosis of certain single gene disorders was first introduced in 1976. DNA-based tests were first applied on a practical basis for the prenatal diagnosis of alpha-Thalassemia in 1978, sickle cell anemia in 1978, beta-thalassemia in 1980, hemophilia A in 1985, hemophilia B in 1984, phenylketonuria in 1985, Duchenne and Becker muscular dystrophy in 1985, cystic fibrosis in 1986, and Huntington's disease in 1986. This list provides "an indication of the explosion of knowledge and new diagnostic possibilities that have recently occurred." Boehm, C.D. and Kazazian, H.H. Jr., "Prenatal Diagnosis by DNA Analysis" In *The Unborn Patient* 2nd ed., edited by Michael R. Harrison et al., 82-91 at 82. Philadelphia: W.B. Saunders Company, (1991)); and (15) the use of restriction endonuclease enzymes (Martinis, J.; David, G.S.; Bartholomew, R.M.; and Wang, R. "Novel Applications of Monoclonal Antibodes." In *Basic Biology of New Development* In *Biotechnology In Basic Life Sciences* 25(1983): 129-154, at p. 129-130. Cole, S.C.P.; Campling, B.G.; Atlaw, T.; Kozbor, D.; Roder, J.C. "Human Monoclonal Antibodies." *Mol Cell Biochem* 62 (1984): 109-120, at p. 109.

observe a physical structure such as the cerebral cortex or dendritic spines, and when that structure was not present or was removed, the scientist would observe what appeared to happen (the visual result). Since 1973, the new techniques of molecular biology and monoclonal antibody technology have allowed scientists to learn what is occurring in a developing human even before we can see specific structures develop. Scientists can now look at a human's building blocks, the proteins and instructions that control the proteins, so they not only view what happens at a molecular level, but also view when it happens. On a macroscopic level, the new technology of ultrasound and its application to the study of the unborn child in utero (in the womb) has accommodated observation of, with unprecedented clarity, how the unborn human reacts to its environment. Advances in electroencephalography have allowed for the early detection of brain wave activity in the fetus. The results of these investigations demonstrate the level of ignorance concerning the human fetus in 1973. The results point out errors of fact and judgment concerning the then scientific understanding of the human fetus' existence as a unique human being, his or her

development from conception to old age, and the child's ability to react to its environment and to feel pain prior to birth.

The origin and extensive use of molecular biological techniques since 1973 have dramatically changed the way in which modern biology is carried out. By using DNA probe technology, combined with the Southern Hybridization technique, for example, scientists are able to detect the presence or absence of a specific genetic code or instruction in a sample of tissue. When DNA probe techniques are combined with a tool called polymerase chain reaction (PCR)[37] it is possible to identify the presence of a specific genetic code material in a sample as small as one cell[38]. The unprecedented specificity and sensitivity of these techniques

[37] Arnheim, N.; and Levenson, C.H. 1990. "Polymerase Chain Reaction." *Chemical & Engineering News* (Oct. 1990): 36-47, at p. 36. White, T.J.; Arnheim, N.; and Erlich, H.A. "The Polymerase Chain Reaction." *Trends Genet* 5(1989): 185-189, at p. 185. Arnheim, N.; White, T.; and Rainey, W. "Application of PCR: "Organismal and Population Biology." *Bioscience* 40(1990):174-182, at p. 174.

[38] Holding, C.; and Monk, M. "Diagnosis of Beta-Thalassaemia by DNA Amplification in Single Blastomeres from Mouse Preimplantation Embryos." *Lancet* II (1989): 532-535. Handyside, A.H.; Pattinson, J.K.; Penketh, R.J.A.; Delhanty, J.D.A.; Winston, R.M.L.; and Toddenham, E.G.D. "Biopsy of Human Preimplantation Embryos and Sexing by DNA Amplification." *Lancet* I (1989):347-349.

have allowed scientists to ask and answer questions concerning human existence and development at the most basic level. The technology is directly applicable in determining genetic uniqueness, to search for evidence of genetic diseases, to observe human development at a molecular level, to determine (well in advance of gross anatomical observation) the sex of the person and, most recently, to determine paternity. This is done through the analysis of human genes.

2. THE LIFE OF EACH PERSON BEGINS AT CONCEPTION.

(a) *Recent Developments and Discoveries in the Science of Genetics Support the Conclusion that the Life of a Human Being begins at Conception.*

All of the genetic information and material necessary and sufficient for a particular human being exists at the moment human life begins at conception. When the head of the male sperm penetrates inside the female's ovum is the precise moment when the genetic information for the complete development of a unique individual human being is present. The information carried by the father encounters in the same recipient cell the information carried or transmitted by the mother so that suddenly, almost instantaneously, a new constitution is spelled out in genetic terms and everything that is necessary to be a human being is present

immediately after conception.[39] Either the whole information is present for conception of a human being for development to full stages of human growth, after the moment of the entry of the sperm into the ovum, or the genetic information is insufficient and no human being shall develop and conception will fail.[40] Not only is it possible to identify the resultant cell after conception as being human, the individual entity is known and can be identified.[41] This new constitution is complete in all of itself, and is capable of being identified, capable of being read, and the makeup of

[39] See testimony of Dr. Jerome LeJeune (hereinafter "LeJeune") 23a, a world renowned geneticist who provided testimony which is made part of the record of the present case. at 26a, 27a. See n.4 at p. 4 above. See also, Moore, K.L., *Before We Are Born*, W.B. Saunders (1989) p.25, 26; Gilbert, S.F., *Developmental Biology*, Sinauer Ass. Inc., 1985, p.32-37, 58-63; see also, authorities cited in Appendix A attached to this brief.

[40] LeJeune, 23a; Volpe, E.P., *Seeds of Life, In Biology and Human Concerns* (1983), Stout, J., 3rd Ed. Wm. C. Brown Co., p.18-20; Gilbert, S.F., *Developmental Biology*, Sinauer Ass. Inc., 1985, p.32-37, 58-63; Oppenheimer, S.B., et al. *Introduction to Embryonic Development*, 1989, Allyn and Bacon; Editorial Production Service, Lifland, et al. Bookmakers, p.20-60; Bernstein, R. et al. *Biology: The Study of Life* (1982), Harcorth, Brace, Jocvanovick, Inc. p. 584.

[41] LeJeune at 24a.

chromosomes complete. We have, in short, a human being immediately after conception.[42]

Within the process of fertilization is an extraordinary device employed by nature to protect the privacy of the life of the person immediately after conception - as if the right of privacy is written into the law of nature. The egg, a little sphere of one and one-half millimeters in diameter is protected by a transparent membrane (the zona pellucida) which completely covers the egg. Immediately upon a single sperm burrowing inside the zona pellucida, the transparent membrane suddenly becomes physically changed and within microseconds becomes completely impenetrable by any other sperm.[43]

The necessary genetic information to create a human being is created in DNA, a long molecule. Physically, it is analogous to a minute flat ribbon of tape that is used in a tape recorder. Inside the head of a sperm is a long thread of one meter or so which is so tightly coiled in twenty-three little pieces that the whole of its volume can be put on the point of a needle. It contains twenty-

[42] LeJeune at 24a; Moore, *supra*, 26-28; Volpe, *supra*, 18-20. See also authorities cited in Appendix A to this brief.

[43] LeJeune at 24a.

three chromosomes. The ovum also contains twenty three chromosomes. In addition, inside the ovum there are billions of molecules specialized which will recognize and be recognized by the signals given by the RNA in protein constituting the genetic makeup. The information provided by the male sperm is approximately fifty billion bytes of information.[44]

The interaction of the biological components can be analogized to the process of a tape recorder which plays music. When a mini cassette on which the music of an artist such as Mozart is recorded and placed into a tape recorder, one experiences the sound of a symphony. The tape itself has no notes or music, and there are no musicians. Because there is a special code written on the tape, information is conveyed in such a way that the tape recorder will read it and make air move through a loud speaker. What is experienced by a listener is not an orchestra, not musicians, not evidence of music, but the genius of the author. That is how life is played: inside the egg which receives the tape band from the father which has its own tape bands, there forms a sort of table or law of life. Within the egg is a tremendous amount of information

[44] LeJeune at 25a.

to be received and interpreted. The genetic information necessary to form the completed human being is not only the long ribbon of DNA (which through the analogy is the mini cassettes of the symphony), but information in the cell itself, which reads it. The cell is an analogous to the magnetiscope of the tape recorder and possesses within it enormous information.[45]

Methylation of cytosine represents a very recent discovery which supports the conclusion that a human being is a complete person upon conception. It's significance was unknown four or five years ago. Recently discovered is that DNA is even more sophisticated than previously suspected and the messages are written letter by letter, piece by piece. DNA contains basic information with indications that some information must be read immediately and some at a later time. What is meant by the methylation process is that everything to make a particular human being exists at fertilization but is not read at the instant of conception. This discovery was never expected ten years ago and was never predicted: that, in fact, the father's genes underline instructions to immediately produce the membranes inside which the

[45] LeJeune at 25a, 26a.

embryo will develop itself and to make the placenta which is the organ by which it will take the nutrients from the vessels of the mother. That information is contained or underlined in the sperm, not in the mother's egg. The male genetic material, therefore, builds the membranes which becomes the shelter in the placenta which is the food gathering system. The female information acting in concert with the male information, provides the mechanism for the development of the parts of the physical anatomy.[46] All of this information and the sophisticated directed mechanisms is contained in the first cell. The significance of this information is the discovery that disproved there can be a genetic constitution made from one parent only. It is possible to combine the pronuclei of one parent, but it will not develop. The reason for this is because the pronuclei of the sperm and the pronuclei of the egg must have two separate functions and contributions to the development process of a human. On a rare occasion, a sperm will fertilize an egg with no pronucleus. The sperm will duplicate its chromosomes to 46, but this zygote cannot develop -- it is simply not a human

[46] LeJeune at 27a to 28a.

being.[47] It is absolutely required that in the first cell, there be the DNA underlined by methylation both in the male way and DNA methylation in the female way. The extraordinary observation made is that there is only one cell in all of the life of a person in which those two methylation systems from father and mother are present inside a cell unaltered. It is the very first cell which gives life to a person. At each progressive stage of development this methylation is erased and replaced and progressively cells learn by a cascade of reaction to specialize so that some cells will develop to form the brain, another to make the liver, another to make bone, etc. It has been learned, for instance, that the male way of "spelling" is obligatory for muscles, so that even in the female information from which muscles are built to be underlined in a paternal way. This understanding contradicts previous notions that fetal development occurs only through the mother. The child is a complete human being programmed for life from conception.[48]

[47] Gilbert, S.F. *Developmental Biology* Sunderland, Mass.: Sinaver Associates Inc., 1985, at p. 61.

[48] LeJeune 27a to 29a. Chaillet, J.R.; Vogt, T.F.; Beier, D.R.; and Leder, P. "Parental-Specific Methylation of an Imprinted Transgene is Established During Gamestogenesis and Progressively Changes During Embryogenesis." *Cell* 66(1991): 77-83. Surani, M.A.H.; Barton, S.C.; and Norris, M.L. "Nuclear Transplantation in the

The essence of the human being is complete.[49] There exists a consensus within the scientific and medical communities concerning the facts which form the basis for this conclusion.[50]

Present developments in technology have disclosed other discoveries which support the conclusion that a human being is genetically complete at the moment of conception.

Approximately six years ago an Englishman, Alec Jeffreys, discovered and developed a technique which has the capabilities of determining the identity of a particular human being. Jeffreys discovered that, in part of the chromosomes, the DNA is repetitive. It can be repeated as much as one hundred times. This region of DNA can be used to make a genetic "fingerprint" of each individual human being. Much like a bar code in a store uniquely identifies a product, this fingerprint uniquely identifies an individual and can

Mouse: Heritable Differences Between Paternal Genomes after Activation of the Embryotic Genome." *Cell* 45(1986): 127-136. Swain, J.L.; Stewart, T.A.; and Leder, P. "Parental Legacy Determines Methylation and Expression of a Cutosomal Transgene; A Molecular Mechanism for Paternal Imprinting." *Cell* 50(1987):719-727, at p. 719.

[49] LeJeune 28a to29a.

[50] See discussion, p. 37 to 40 and authorities cited in Appendix A attached to this Brief.

be "read." Jeffreys developed a method of extracting DNA and a technique for examining it. The technique creates the ability to record unique traits of the individual being examined. Jeffreys' method can be used to prove that each person is unique and that the sequence of the bars that he is able to identify is absolutely typical of and specific to the person being examined, and is termed a "fingerprint" of DNA.[51]

As it relates to human development, the Jeffreys technique has been applied to determine if two samples containing genetic material (DNA) are from the same organism. For example, the technique can be used to determine that the developing human, after fertilization, is genetically distinct from its parents. The techniques have also been used to determine if cells from unique organisms, an example is a parent and its child, are genetically

[51] LeJeune at 26a to 27a; Jeffreys, et al. *DNA Fingerprints and Segregation Analysis of Multiple Markers in Human Pedigrees*, Am. Journal of Human Genetics, 39:11-24 (1986); Honma, M., et al. *Application of DNA Fingerprinting to Parentage and Extended Family Relationship Testing*, Human heredity, 1990, 40:p356-362; Jeffreys, A.J., et al., *Principles and Recent Advances of Human DNA Fingerprinting*; DNA Fingerprinting: Approaches and Applications, edited by Jeffreys (1991).

related.[52] The whole field of DNA fingerprinting as applied in court cases and in paternity (and for that matter maternity) questions is the direct result of this technology. The use of DNA fingerprinting in these types of questions is based upon the scientific fact that the DNA fragments found in a child's DNA fingerprint are always approximately equally divided between those of maternal and paternal origin.[53]

The technique has also been successfully used in determining the paternity of the developing child in a case of consensual sex with two male partners, where the mother had decided to deliver the child if one man was the father and to abort the child if the other man was the father. The technique was also used in a rape case to determine if her husband or an unknown rapist was the father. Tests were performed on the fetus at 16 weeks gestation in the first case and at 9 weeks gestation in the rape case. Paternity was established with a certainty of 68 trillion to one in

[52] Jeffreys, A.J.; Brookfield, J.F.Y; and Semeonoff, R. "Positive Identification of an Immigration Test-Case Using Human DNA Fingerprints." *Nature* 317 (1985):818-819, at pp. 818-819.

[53] Honma, M.; and Ishiyama, I. "Application of DNA Fingerprinting to Parentage and Extended Family Relationship Testing." *Hum Hered* 40(1990): 356-362, at p. 356.

the first case and at a certainty of 360 trillion to one in the rape case (unless the rapist was the father's identical twin). The authors conclude that molecular genetic fingerprinting is "... ideally suited to address questions of familial relationship in the prenatal period."[54]

The procedure also established the existence of a unique human being other than the mother at the time of the tests.

The technologies of molecular biology have recently begun to find application in the detection of fetal abnormalities and fetal sex determinations through the analysis of the very small number of fetal cells that have found their way into the mother's bloodstream (about 1 cell in 10 to 100 million blood cells of the mother).[55] Using cell sorting technology (another post 1973 development) and DNA probe technology, scientists have been able to determine, for example, the presence of a growing boy or girl from a sample of

[54] Kovacs, B.W.; Shahbahrami, B.; Medearis, A.L.; and Comings, D.E. "Prenatal Determinations of Paternity by Molecular Genetic "Fingerprinting." *Obstet Gynecol* 75(1990): 474-478, at pp. 474-475.

[55] Price, J.O.; Elias, S.; Wachtel, S.S.; Klinger, K.; Dockter, M.; Tharapel, A.; Schulman, L.P.; Phillips, O.P.; Meyers, C.M.; Schook, D.; and Simpson, J.L. "Prenatal Diagnosis with Fetal Cells Isolated From Maternal Blood by Multiparameter Flow Cymetry" *Am J Obstet Gynecol* 165(1990): 1731-1737, at p. 1731.

4 ml of the mother's blood.[56]It is an established principle of human genetics and heredity that an individual human's cells all contain the same DNA composition (except for sperm and ovum cells)[57] such that in this case the few fetal cells that have found their way into the mother's bloodstream reflected accurately the presence of the unique human sharing the mother's space when the mother's blood was tested.

"The ability to detect genetic disorders before birth has improved dramatically during the last two decades."[58]

The application of deoxyribonucleic acid (DNA) techniques to prenatal diagnosis of certain single gene disorders was first introduced in 1976. DNA-based tests were first applied on a practical basis for the prenatal diagnosis of alpha-Thalassemia in

[56] Price, J.O.; Elias, S.; Wachtel, S.S.; Klinger, K.; Dockter, M.; Tharapel, A.; Schulman, L.P.; Phillips, O.P.; Meyers, C.M.; Schook, D.; and Simpson, J.L. "Prenatal Diagnosis with Fetal Cells Isolated From Maternal Blood by Multiparameter Flow Cytometry" *Am J Obstet Gynecol* 165(1990): 1731-1737, at p. 1731.

[57] Oppenheimer, S.B.; and Lefeure, G. Jr. *Introduction to Embryonic Development* Allyn and Bacon 1989. (pp. 20-60) at p. 53. Papalia, D.E.; and Okls, S.W. *A Child's World: Infancy Through Adolescence*. New York: McGraw-Hill, Inc., 1979, at p. 51.

[58] Hogge, W. A. "Chorionic Villus Sampling" In *The Unborn Patient* 2nd ed. edited by M.R. Harrison et al., 53-57. Philadelphia: W.B. Saunders Co., 1991, at p. 53.

1978, sickle cell anemia in 1978, beta-thalassemia in 1980, hemophilia A in 1985, hemophilia B in 1984, phenylketonuria in 1985, Duchenne and Becker muscular dystrophy in 1985, cystic fibrosis in 1986, and Huntington's disease in 1986. This list provides "an indication of the explosion of knowledge and new diagnostic possibilities that have recently occurred.[59]

Another major advancement has been the use of chorionic villus sampling. It was only in 1982 that its potential use in determining genetic disorders was realized. In less than five years, this technique has been widely substituted in place of amniocentesis. Due to the fact that trophoblastic tissue has the same "genetic constitution" as the fetus, a sample from the chorionic villi reflects the chromosomal, biochemical, and DNA status of the fetus. Therefore, the production of trophoblastic tissue is controlled by the DNA of the developing fetus and not

[59] Boehm, C.D. and Kazazian, H.H. Jr., "Prenatal Diagnosis by DNA Analysis" In *The Unborn Patient* 2nd ed., edited by Michael R. Harrison et al., 82-91 at 82. Philadelphia: W.B. Saunders Company, (1991).

that of the mother. This procedure uses tissue collected in the first trimester of life.[60]

The techniques involved in the generation of "in vitro" fertilization, commonly called test tube babies, the first born in 1973, argue that the product of test tube conception is a unique human being. Before implantation the new living being is clearly separate from its mother. During the period after fertilization and before implantation, it has been possible to determine the sex of the human, whose development is started by a clear physical separation from the mother and father.[61] The preimplantation diagnosis of certain genetic diseases has also been considered a feasible medical advance.[62] Neither of these procedures makes much sense if the pre-implanted human embryo is not a genetically unique human.

[60] Hogge, W.A. "Chorionic Villus Sampling" In *The Unborn Patient* 2nd ed. edited by M.R. Harrison et al., 53-57. Philadelphia: W.B. Saunders Co., 1991, at p. 53.

[61] Handyside, A.H.; Pattinson, J.K.; Penketh, R.J.A.; Delhanty, J.D.A.; Winston, R.M.L.; and Toddenham, E.G.D. 1989. "Biopsy of Human Preimplantation Embryos and Sexing by DNA Amplification." *Lancet* I (1989):347-349, at p. 348.

[62] Monk, M.; and Holding, C. "Amplification of a Beta-Haemoglobin Sequence in Individual Human Oocytes and Polar Bodies." *Lancet* 335(1990): 885-987, at 985.

The goal in the study of human embryo viability in synthetic culture medium is improved development and pregnancy success. Recently an embryo derived platelet activating factor was discovered, which when added to growth media, has dramatically increased the developmental and pregnancy potential of the embryo.[63] This chemical, a product of the new human, supports the conclusion that, even before implantation, there is an independent, unique human capable of producing substances that enhance its own survival.

A description of the fetus as a part of a woman's body has been an attractive argument for those who see the fetus as not a unique human. Presumably as a part of the mother's body the fetus' growth and development would be subject to genetic control by the mother. However, using modern molecular biology technology, not available in the 1970's, it has been found that by

[63] O'Neill, C. "A Consideration of the Factors Which Influence and Control the Viability and Developmental Potential of the Preimplantation Embryo." *Baillieres Clin Obstet Gynaecol* 5(1991): 159-178.

the third cell division after fertilization control of growth and development has been established by the new human's DNA.[64]

(b) *There is a consensus within the scientific and medical communities concerning the critical biological and genetic facts which are pertinent to when the life of a person begins.*

The defendant V.C. claims, to support her contention that the child should not enjoy constitutional rights prior to birth, that, "there is no consensus in the scientific community that life begins at conception." (See Affidavit filed by Defendant at 84a to 85a.)

This statement concerning a lack of scientific consensus is intended to argue that the truth about human life cannot be determined, and therefore, no attempt should be made. This claim is false, and the incorrect nature of it serves to demonstrate the validity of plaintiff's point that the time has arrived for a reexamination of the underlying question of *Roe* (when life begins) and whether a child enjoys rights at any time before birth, under the state or federal constitutions.

[64] Telford, N.A.; Watson, A.J.; and Schultz, G.A. "Transition From Maternal to Embryonic Control in Early Manmalian Development: A Comparison of Several Species." Molecular Reproduction and Development 26(1990): 90-100, at 92.

Respondent relies upon an affidavit of one Michael V.L. Bennett, dated May 15, 1990, to support her contention that there is no consensus that life begins at conception (83a to 90a).[65] This affidavit relies upon testimony of Dr. Leon Rosenberg and Dr. Joseph Boyle given eleven years ago in 1981 before the Subcommittee on Separation of Powers of the Judiciary Committee of the U.S. Senate (Human Life Bill, S. 158, 97th Cong., 1st Sess.).

It is pertinent that there is no serious dispute or lack of consensus concerning the important scientific and medical facts relevant to when life begins. It is appropriate to first examine the defendant's statement and then examine the consensus on the facts.

Respondent relies on Dr. Rosenberg's 1981 statements to support the contention that there is no scientific consensus on when life begins (84a (par. 3) to 85a (par. 5)). Defendant, however, avoids mention of the fact that the subcommittee, before whom Dr. Rosenberg testified, published a report which specifically found, as a matter of scientific fact, that life begins at conception:

[65] This affidavit was first made part of the record in this case on March 22, 1992 before the New Jersey Supreme Court. The defendant has referred to it in court papers ever since.

> The testimony of these witnesses and the voluminous submissions received by the subcommittee demonstrate that contemporary scientific evidence points to a clear conclusion: life of a human being begins at conception ... today the facts are beyond dispute.
>
> Physicians, biologists, and other scientists agree that conception marks the beginning of the life of a human being ... there is overwhelming agreement on this point in countless medical, biological, and scientific writings.[66]

Further, the report singled out Dr. Rosenberg for comment, observing:

> It may at first seem difficult to reconcile how the existence of such a broad consensus with the testimony of some witnesses opposing S-158 before the Subcommittee who emphatically denied that it is possible to determine when a human life begins. If the facts are so clear, it is crucial to understand how, for example, one like (Dr. Leon Rosenberg) could say that he knows of no scientific evidence that shows when actual human life exists.
>
> Such statements appear on the surface to present a direct contradiction to the biological evidence discussed above. The explanation of this apparent contradiction lies in existence of the two distinct questions identified above, the scientific question and the value question. We must consider not only whether unborn children are human beings, but also whether to accord their lives intrinsic worth and value equal to those of other human beings. The two questions are separate and distinct. It is a scientific question whether an unborn child is a human being, in the sense of a living member of the human species. It is a value question whether the life of an unborn

[66] Report on Human Life Bill, Subcommittee on Separation of Powers, Committee on the Judiciary United States Senate (97th Cong., 1st Sess. 1981) p. 7.

> child has intrinsic worth and equal value with other human beings.
>
> Those witnesses who testified that science cannot say whether unborn children are human beings were speaking in every instance to the value question rather than the scientific question. No witness raised any evidence to refute the biological fact that from the moment of human conception there exists a distinct individual being who is alive and is of the human species. No witness challenged the scientific consensus that unborn children are 'human beings', insofar as the term is used to mean living beings of the human species.[67]

The Subcommittee report identifies Dr. Rosenberg, by name, as one who adopted an unreal and untruthful approach to the question by deciding that whether the unborn child is not a person is simply a matter of definition, not a question of fact, and the definition can be defined anyway one wishes [without regard to fact]. Only by adopting this approach could Dr. Rosenberg state that he "knows of no scientific evidence showing when actual human life exists." The Subcommittee noted that "he was speaking only to the value questions ...".[68]

The plaintiff has searched the literature with the aid of medical and scientific experts, and is unable to find a single modern

[67] Report on Human Life Bill, *supra*, at 10, 11.

[68] Report on Human Life Bill, *supra* at 11, 12.

reference in the scientific literature which refutes the statement that humans are genetically distinct and complete from their parents at the moment of conception, and that they are anything other than human. The scientific literature is replete with clear statements that human life begins at conception.[69]

3. THE EARLY DEVELOPMENT OF THE HUMAN BEING: *THE UNBORN CHILD CAN EXPERIENCE PAIN AS EARLY AS EIGHT TO ELEVEN WEEKS AFTER CONCEPTION.*

   (a) *The Stages of Growth of the Unborn Child is a Seamless Continuum from Conception to Birth; Advances in Medicine Pertinent to the legal Inquiry.*

The english language is burdened with terms developed at times in the history of medicine when it did not possess the current level of knowledge. But the "stages of growth and development" of the new human being is a "seamless continuum".[70] Immediately upon conception the "fertilized egg" has been referred to as the zygote. At three days the child has developed from a single cell to a sixteen cell individual termed "morula". The term

[69] Plaintiff has compiled a partial list of quotations from scientific and medical journals that make the clear statement that life begins at conception. The list is found at the end of this brief and entitled "Appendix B."

[70] See testimony of Dr. Bernard Nathanson at 43a-44a; see n.5 at p. 5, above; 59a to 66a.

"embryo" connotes the developing human being from the morula stage to about the end of the eighth week. The term "fetus" is used to describe the stage of the development from the end of the eighth week up to the time that the baby is actually delivered whatever the age of the child at birth. The terms zygote, morula, embryo and fetus are only terms of development of the same human being just the same as the terms "infant", "child", "adolescent" and "adult" also describe different stages of development of the human being.[71]

The child is always a separate individual from the mother. Circulations are always separate and the mother and fetus can even have two different blood types.[72] If the blood circulations do in fact mix, it could be lethal for the baby and even for the mother. This relationship is clearly disclosed by developments in immunology. The white blood cells in the immune system of the mother are capable of recognizing and distinguishing the mother from the child. That is the principle reason why the immune system does not kill the organs of the mother. The white blood

[71] Nathanson at 44a.

[72] Clark, J., ed. *Genetics and Heredity: The Blueprints of Life. The Human Body*. Torstar Books Inc., 1985, at p. 9.

cells actually recognize parts of the mother as being her body. It also distinguishes a body that is not part of itself. If a foreign substance enters a person's body the white blood cells recognize it and immediately attack to expel it. When pregnancy progresses and the blastocyst implants, (when the child is eight or nine days old), chemical messages are sent to various systems in the mother and the immune system (the white blood cells included) galvanizes because it recognizes that there is a foreign body within the mother. A concerted immune attack is focused on the new human being and the objective of the immune system is to expel the foreign body. The unborn baby erects a defense against the attack. The trophoblast which constructs the placenta serves as an immunological wall. Most human beings survive the attack of the mother's immune system. Those which do not survive are expelled, which are referred to as "spontaneous miscarriages".[73]

(b) *Based upon New Scientific and Medical Information, the Unborn Child Experiences Pain During Abortion even as early as Eight or Nine Weeks After Conception.*

[73] Hedge, U.C. "Immunomodulation of the Mother During Pregnancy." *Med Hypothesis* 35(1991): 159-164, at p. 159. Nathanson, at 46a to 48a.

(i) Introduction

Dr. Bernard Nathanson has expressed the opinion that the unborn child experiences excruciating pain during abortion. A vivid description which Dr. Nathanson claims supports this conclusion is incorporated in a film of an actual abortion entitled "The Silent Scream" made in 1984. Recent discoveries discussed below, now provide scientific data and information which supports that contention. Dr. Nathanson describes the film of an abortion of a child at the stage of eight weeks through the use of ultrasound technology. In the abortion, the doctor puts an instrument into the womb to dilate the cervix, the water is broken and the embryonic fluid is permitted to flow out. Then the doctor inserts a suction apparatus into the uterus. It can be seen that the baby moves away from the suction apparatus. The suction is turned on and a tremendous negative force is used to pull the baby from its living quarters. In the suctioning process, the arms and legs of the human being are being torn off and then subsequently the body is being ripped apart. Dr. Nathanson explained that the head of the baby was too large to be suctioned out so the doctor took a polyp forcep to reach into the uterus to locate the baby's head and put the forcep around it and then close the forceps. The film,

according to Dr. Nathanson, reveals that the child's head is actually crushed in the process. It is Dr. Nathanson's opinion that an abortion of an unborn child in the mother's womb subjects the human being to unimaginable agony and it ends the life of a person in a barbaric and bloody manner. In the film it can be seen, according to Dr. Nathanson, that the mouth of the young unborn baby is open. It is described as a dramatic, arresting moment and heart stopping moment. It can be seen that the child was grimacing and was evidencing pain and agony.[74]

Studies being conducted as a result of the availability of new technology has resulted in data and information which supports the conclusion that the unborn child is subjected to great pain when an abortion takes place in the third trimester, and the unborn child experiences pain even as early as eight or nine weeks after conception.

(ii) The New Technology

Development of the post 1973 techniques of monoclonal antibody production, first described in 1975 using mouse material and then further developed to allow the production of specific

[74] Nathanson at 48a to 50a.

human antibodies in the early 1980's[75], has complemented DNA and RNA studies which are the subject of Molecular Biology, by allowing for the specific detection and location of individual proteins or peptides in a human cell sample.

The use of monoclonal antibody technology[76], as well as recent developments in modern protein chemistry and electrophysiology, are being applied to questions relevant to human developmental neurobiology. Initially applied in the mid 1980's, the power of the new techniques was recognized as having the potential to revolutionize our understanding of the human nervous system at it's inception. Scientists recognized that with the new technology they could investigate nervous system function and development at the molecular or chemical level. They were no

[75] Martinis, J.; David, G.S.; Bartholomew, R.M.; and Wang, R. "Novel Applications of Monoclonal Antibodies." In *Basic Biology of New Development In Biotechnology In Basic Life Sciences* 25(1983): 129-154, at pp. 129-130. Cole, S.C.P.; Campling, B.G.; Atlaw, T.; Kozbor, D.; Roder, J.C. "Human Monoclonal Antibodies." *Mol Cell Biochem* 62 (1984): 109-120, at p. 109.

[76] Campbell, A.M. "Monoclonal Antibody Technology" In *Laboratory Techniques and Biochemistry and Molecular Biology*, edited by R.H. Burdon and P.H. Van Knippenberg. Eisevier (Amsterdam), 1985

longer limited to observations of the histological presence of nerves and other gross functionality to learn more about the human nervous system. From the start, the early results of this technological application were to show that the classical histological and functional criteria for defining (nerve) cell types was oversimplified.[77]

One outstanding discovery in the field of neurobiology since 1973 was the detection of some 30 neuropeptides (or nerve hormones) directly involved in the functioning nervous system of the human body. The presence of peptides (the hormones) of the endocrine system were known in 1973; but since 1973 similar substances have been found to be present in nerve fibers. This discovery, which identified more than 30 neuropeptides, was described in 1985 as a recent and revolutionary discovery.[78] These neuropeptides function as neurotransmitters and neuromodulators which are located at axon terminals at synapses

[77] Fischbach, G.D. "An Introduction to Molecular Approaches in Studies of Neuronal Development and Synapse Formation." In *Molecular Neurobiology* In *Neurology and Psychiatry*, edited by M.D. Erich, R. Kandel. New York: Raven Press, 1987.

[78] Ballesta, J.; Bloom, S.R.; and Polak, J.M. "Distribution and Localization of Regulatory Peptides." *Crit Rev Clin Lab Sci* 22(1985):185-218, at pp. 185-186.

throughout human tissue. Two of the neuropeptides that are of particular relevance to this discussion are substance P (the chemical messenger of pain) and enkephalin (a neurotransmitter involved in pain perception).[79] The detection of these two neuropeptides in samples of human tissue has been used as a convenient way to define and locate nervous system development and function in the human being from the time of conception. In 1985, the study of neuropeptides was still in its infancy, but due to the field's accelerated pace of study, the results to date point to a very complex process of interacting peptides, neurons, and ion channels which play an important role in the detection and transmission of sensation in the human. Their discovery was a direct result of new immunocytochemical techniques used in conjunction with radioimmunoassay, neither of which were available in the 1970's.

The crude ultrasound devices that were available in the early 1970's permitted limited access to knowledge of a child during the early stages of growth. "Real time ultrasound" was developed in 1976 and actually created a motion picture which could depict

[79] Clark, J., ed. *The Nervous System: Circuits of Communication. The Human Body*. Torstar Books, Inc., 1985, at pp. 152-154.

movement and function such as breathing, urination, swallowing and other functions of the human existence. This level of visualization permits diagnosis of the child's illnesses while in its mother's womb. Medicine can now watch how the child functions including such intricate detail as the operation of the tiny little valves of the heart as it flops up and down pushing blood. Abnormalities in things such as heart valves can be detected and rather sophisticated operations are currently performed on unborn children at four to five months.[80]

First pioneered in 1981, fetal surgery has made dramatic advances. Both mother and fetus are anesthetized, the mother's abdomen surgically opened and the uterus incisioned. While still attached to the umbilical cord, amniotic fluid is drained off, and "the surgeon removes the fetus' left arm from the uterus and attaches specially designed fetal monitors."[81] These fetal monitors are for ECG, transcutaneous oxygenation, and temperature readings. The baby is incised surgically, repaired, and is placed back into the mother's uterus. The uterus is filled with

[80] Nathanson at 44a to 45a.

[81] Levine, A.H. "Fetal Surgery." *Aorn*, 54(1991): 17-19, 22-27, 30-32, at p. 30.

warm lactated Ringer's solution and prophylactic antibiotics to replace any lost amniotic fluid.[82] Fetal heart rate and oxygen saturation monitoring is a norm in these procedures.[83] Some defects that might require this procedure include urethral obstruction, congenital diaphragmatic hernia, fetal chylothorax, sacrococcygeal teratoma (a fetal tumor).[84] After surgery, the child can proceed through pregnancy to, at, or near full term.[85] During the fetal surgery the baby is treated like an adult patient, and must be anesthetized to reduce pain.[86]

Medicine has also recently developed the electronic fetal heart monitor which permits sophisticated investigation of the fetus.

[82] Levine, A.H. "Fetal Surgery." *Aorn*, 54(1991): 17-19, 22-27, 30-32, at p. 30. Nathanson at 52a.

[83] Harrison, M.R.; Langer, J.C.; Adzick, N.S.; Golbus, M.S.; Filly, R.A.; Anderson, R.L.; Rosen, M.A.; Callen, P.W.; Goldstein, R.G.; and deLorimier, A.A. "Correction of Congenital Diaphragmatic Hernia In Utero, V. Initial Clinical Experience." J Pediatric Surg 25(1990):47-57, at p. 49.

[84] Harrison, M.; and Adzick, N.S. "The Fetus as a Patient." *Ann Sur* 213(1991): 279-291, at p. 281.

[85] Strickland, R.A.; Oliver, W.C.; Chantigian, R.C.; Ney, J.A.; and Davidson, G.K. "Anesthesia, Cardiopulmonary Bypass, and the Pregnant Patient." *Mayo Clin Proc* 66(1991): 411-429, at p. 413. Nathanson at 46a.

[86] See discussion on fetal pain found below at p. 62-63.

The electronic fetal heart monitor tracks the fetal heart rate from moment to moment and it can detect reactions of the unborn child to such things as different types of music.[87] The child functions in a very human way, excretes urine, and its heart beats regularly (since three weeks).

(iii) *Assumptions About Pain.*

Since the time of *Roe v. Wade* there have been a number of generally accepted assumptions about human neurological development and our ability to feel pain that have been refuted. The first assumption was that neonates were incapable of feeling pain.[88] The second assumption was that myelinated nerve fibers were necessary for pain perception, and since they did not form completely until after birth pain perception was a late developmental event. The third assumption was that pain experience required pain detecting nerves connected to the thalamus and then to the brain cortex; furthermore there was presumed to be a period of cortical maturation necessary before pain could be experienced. All of these assumptions were based

[87] Nathanson, at 46a.

[88] Porter, F. "Pain in a Newborn," *Neonatal Neurology, Clinics in Neonatology,* 16(2) p. 549 et seq. (1989).

upon gross histological observations. Those making such assumptions did not know about neuropeptides and their detection and function. They also did not have available the modern methodologies and techniques developed in the last decade.

It was only in the last decade that the traditional concept accepted at the time of *Roe*, that even normal neonates cannot feel pain, was first challenged.[89] It had been assumed by the medical community that a fully developed and mature cortical brain region was necessary for pain perception. This assumption, it became clear, was inconsistent with the observations of care givers for premature infants.[90]

[89] Fitzgerald, M.; and McIntosh, N. "Pain and Analgesia in the Newborn." *Arch Dis Child* 64(1989): 441-443, at p. 441.

[90] One of whom stated eloquently,

> "It has generally been assumed that the ability of a child to feel pain increases with age and that neonates may not perceive pain or may perceive it only minimally. Assumed by whom? Certainly not by those of us at the bedside of critically ill infants, who see them flinch from procedures, startle in response to loud noises, and turn from bright lights and various other forms of stimulation. Not by those who have heard infants' anguished cries and seen their vigorous withdrawals from painful stimuli. Not by those who have observed their increased heart and respiratory rates and profuse sweating in response to heel sticks or circumcision. And finally, not by those who have seen babies gasp for every breath as they die from incurable lung disease."

Biochemical studies supported the observations of care givers concerning pain experiences. Studies on unborn and premature infants pushed back the developmental time when pain was experienced. Detailed hormonal studies in preterm neonates undergoing surgery under minimal anesthesia have shown marked release of catecholamines, as well as autonomic nervous stimulation, heart rate changes, increased hormonal activity and increased motor activity. These activities are consistent with stress experienced with pain.[91] It has been documented that endocrine and metabolic responses associated with pain are abolished by giving anesthesia to preterm neonates[92], and to the fetus.[93]

Fletcher, A.B. "Pain in the Neonate." *N Eng J Med* 317(1987): 1347-1348, at p. 1347.

[91] Rosen, M.A., *Anesthesia for Procedures Involving the Fetus* (1991), Seminars in Perinatology 15:410-417.

[92] Scanlon, J.W.; "Appreciating Neonatal Pain." *Adv Pediatr* 38(1991): 317-333, at p. 320. Rosen, M.A. "Anesthesia for Procedures Involving the Fetus." *Semin Perinatol* 15(1991): 410-417, at p. 431.

[93] Levine, A.H. (1991), Fetal Surgery, *Aorn J*, V54(1): 16-19, 22-27, 30-32, at p. 27. Rosen, M. "Anesthesia and Monitoring for Fetal Intervention" In *The Unborn Patient* 2nd ed., (1991), Harrison (editors), W.B. Saunders Co. p. 176, at p. 176.

Based upon this and other studies standard medical practice changed. A New England Journal of Medicine editorial stated:

> Any decision to withhold anesthetic agents ought not to be based on the infant's age or *perceived degree of cortical maturity*; it should be based upon the same criteria used in older patients."[94] (Emphasis added).

In the current state of medicine, with operative procedures being performed on premature babies as early as four months, it is a standard medical practice, to anesthetize the child (at any age).[95] Anesthesia is used on fetuses in operations because of the premature children's experiencing of pain.[96]

(iv) *The Need to Relieve Pain During Fetal Surgery.*

Since 1981, fetal surgery has become a reality. Both mother and fetus are anesthetized, the mother's abdomen surgically opened and the uterus incisioned. While still attached to the

[94] Fletcher, A.B. "Pain in the Neonate." *N Eng J Med* 317(1987): 1347-1348, at p. 1348.

[95] See Porter, F., *Pain in a Newborn*, Neonatal Neurology, Clinics in Neonatology, 16(2) p.549 et seq. 1989. For general discussion of current medical practice for pain relief for neonates see: Choonara, I, *Management of Pian in Newborn Infants*, in Seminars on Peranotology, 16(i):32-40 (1992); Malhortora, N., L. Han, *Privilege of Analgesia in the Neonate*, in Seminars in Perinatology, 15(5):418-422 (1991).

[96] See discussion below under subsection (iv)(fetal surgery).

umbilical cord, amniotic fluid is drained off, and "the surgeon removes the fetus' left arm from the uterus and attaches specially designed fetal monitors."[97] The baby is incised surgically, repaired, and is placed back into the mother's uterus. Fetal heart rate and oxygen saturation monitoring is a norm in these procedures.[98] After surgery, the child can proceed through pregnancy to, at, or near full term.[99]

It is common practice to monitor fetal vital signs and to give the fetus anesthesia.[100] "Although the mother is anesthetized for

[97] Levine, A.H. "Fetal Surgery." *Aorn*, 54(1991): 17-19, 22-27, 30-32, at p. 30.

[98] Harrison, M.R.; Langer, J.C.; Adzick, N.S.; Golbus, M.S.; Filly, R.A.; Anderson, R.L.; Rosen, M.A.; Callen, P.W.; Goldstein, R.G.; and deLorimier, A.A. "Correction of Congenital Diaphragmatic Hernia In Utero, V. Initial Clinical Experience." J Pediatric Surg 25(1990):47-57, at p. 49.

[99] Strickland, R.A.; Oliver, W.C.; Chantigian, R.C.; Ney, J.A.; and Davidson, G.K. "Anesthesia, Cardiopulmonary Bypass, and the Pregnant Patient." *Mayo Clin Proc* 66(1991): 411-429, at p. 413. Nathanson 46a.

[100] Levine, A.H. "Fetal Surgery." *Aorn J*, 54(1991): 17-19, 22-27, 30-32, at p. 30. Harrison, M.R.; Adzick, N.S.; Longuker, M.T.; Goldberg, J.D.; Rosen, M.A.; Filly, R.H.; Evans, M.I.; and Golbos, M.S. "Successful Repair in Utero of a Fetal Diaphragmatic Hernia After Removal of Herniated Viscera from the Left Thorax." *N Eng J Med* 322(1990): 1582-1584, at p. 1582. Strickland, R.A.; Oliver, W.C.; Chantigian, R.C.; Ney, J.A.; and Davidson, G.K. "Anesthesia, Cardiopulmonary Bypass, and the Pregnant Patient."

fetal surgery, the fetus becomes the prime target for the anesthesia."[101] "For fetal surgery, unlike maternal surgery, the fetus is not an innocent bystander for whom we attempt the least anesthetic interference. Instead, the fetus is the primary patient, requiring safe administration of anesthesia and close monitoring of anesthetic effects to ensure well being."[102] Studies indicate that performing surgery on unanesthetized fetuses results in automic nervous system stimulation, increased hormonal activity, increased

Mayo Clin Proc 66(1991): 411-429, at pp. 414-415. Longaker, M.T.; Golbus, M.S.; Filly, R.A.; Rosen, M.A.; Chang, S.W.; and Harrison, M.R. "Maternal Outcome After Open Fetal Surgery." *JAMA* 265(1991): 737-741, at p. 737. Harrison, M.R.; Golbus, M.S.; Filly, R.A.; Anderson, R.L.; Flake, A.W.; Rosen, M.; and Huff, R.W. "Fetal Hydronephrosis: Selection and Surgical Repair." *J Pediatr Surg* 22(1987): 556-558, at p. 556. Rosen, M. "Anesthesia and Monitoring for Fetal Intervention" In *The Unborn Patient* 2nd ed., edited by M.R. Harrison 172-181. Philadelphia: W.B. Saunders Co., 1991, at p. 176; Strickland, supra, at 411.

[101] Levine, A.H. "Fetal Surgery." *Aorn J*, 54(1991): 17-19, 22-27, 30-32, at p. 27. See also, Strickland, supra, at p. 411.

[102] Rosen, M. "Anesthesia and Monitoring for Fetal Intervention" In *The Unborn Patient* 2nd ed., edited by M.R. Harrison 172-181. Philadelphia: W.B. Saunders Co., 1991, at p. 176.

motor activity, and variations in heart rate.[103] Fetal surgery is feasible on an ill patient as early as 18 weeks gestation.[104]

(v) Non Myelinated Nerve Fibers Transmit Pain.

Until recently pain perception was presumed to require myelinated[105] nerve fibers[106] (present later in development). It has also been shown that this is not necessarily the case even in adults.[107] Both myelinated and unmyelinated nerve fibers

[103] Levine, A.H. "Fetal Surgery." *Aorn J*, 54(1991): 17-19, 22-27, 30-32, at p. 27. Rosen, M. "Anesthesia and Monitoring for Fetal Intervention" In *The Unborn Patient* 2nd ed., edited by M.R. Harrison 172-181. Philadelphia: W.B. Saunders Co., 1991, at p. 176.

[104] Harrison, M.; and Adzick, N.S. "The Fetus as a Patient." *Ann Sur* 213(1991): 279-291, at p. 281.

[105] Myelin is the fatty substance that makes up the sheath around many nerve fiber.

[106] Clark, J., ed. *The Nervous System: Circuits of Communication. The Human Body.* Torstar Books, Inc., 1985, at p. 153.

[107] Anand, K.J.S.; and Hickey, P.R. "Pain and Its Effects in the Human Neonate and Fetus." *N Engl J Med* 317(1987): 1321-1329, at p. 1322. Casey, K.L. "Neural Mechanisms of Pain: An Overview." *Acta Anaesthesiol Scand* Suppl 74(1982): 13-20, at 13.

transmit pain.[108] Most fibers of the nervous system of a newborn full term infant are not myelinated until two years after birth when the spinal cord, brainstem, and cerebellum are finally myelinated.[109] Myelin is not needed to conduct impulses over the nonmyelinated fibers, but the non-myelinated fibers conduct slower than myelinated ones (but in an infant who is physically smaller than an adult, the impulses do not have as far to travel.)[110] "Even when mature, most peripheral pain fibers are unmyelinated or, at best, thinly myelinated, lack of myelination therefore cannot be used as a valid argument to deny pain appreciation in the newborn."[111] A recent analysis of pain experiences in adults reached the conclusion that the classical view of the nervous system as a hard wired system projecting

[108] Anand, K.J.S.; and Hickey, P.R. "Pain and Its Effects in the Human Neonate and Fetus." *N Engl J Med* 317(1987): 1321-1329, at 1322.

[109] Clark, J., ed. "The Nervous System: Circuits of Communication." *The Human Body*. Torstar Books, Inc. (1985).

[110] Clark, J., ed. *The Nervous System: Circuits of Communication. The Human Body*. Torstar Books, Inc., 1985, p. 109.

[111] Scanlon, J.W.; "Appreciating Neonatal Pain." *Adv Pediatr* 38(1991): 317-333, at p. 320.

from nociceptors (pain detecting nerves) to the thalamus and then to the cortex cannot explain all pain experiences.[112] Thus, this classical view needs to be modified or replaced.

(vi) It is Now Known that Full Cortical Development Is Not Necessary for the Child to Experience and Respond to Pain Prior to Birth.

Citing an old study, defendant claims that cortical synapses and thalamocortical connections are "prerequisites" for neocortical reception of body sensation and these do not begin to develop until the unborn child is 22 to 23 weeks old.[113]

It is well known, however, that the human brain does not reach complete development until adulthood.[114] Putting aside for the moment the evidence that science is now uncovering which

[112] Wall, P.D. "The Biological Function and Dysfunction of Different Pain Mechanisms." In *Advances in Pain Research and Therapy*. Edited by F. Sicuteri, (10:19-28). New York: Raven Press, 1992, at p. 19.

[113] Reference 87a to 88a. It is significant to note that, even the defendant, V.C. must concede that all that is necessary for a person to experience pain is present from the 22nd to the 23rd week of life. Even the pro-abortionists must acknowledge that abortions at that point cause a painful death.

[114] Lagercrantz, H.; and Forssberg, H. "Functional Development of the Brain in the Fetus and Infant." *Lakartidningen* 88 (1991): 1880-1885.

supports the conclusion that the unborn child is capable of experiencing pain long before the twenty-eighth week and as early as the eighth week after conception and that it is current questioned that cortical involvement is necessary for pain perception.[115] The defendant V.C.'s position is that all that is needed for pain perception is present at 26 weeks gestation. Therefore, abortions performed after that point cause a painful death.

As mentioned above however, science has called into question the latest assumption that cortical involvement is necessary for pain detection.[116] Evidence to support the premise that pain can be experienced by us before 26 weeks gestation comes from the early detection of pain associated chemicals; the timing of nerve development; the observation of fetal behavior and the characterization of full term infants with anencephaly.

[115] Boreus, L.O. "Pain in the Newborn - Pharmacodynamic Aspects." *Dev Pharmacol Ther* 15(1990): 142-148, at p. 144. See also discussion at p. 71-73.

[116] Boreus, supra at p. 144.

The discovery of neuropeptides and their function as nerve impulse transmitters and modulators was totally unknown at the time of *Roe v. Wade* and is recognized as revolutionary.

The presence of substance P is a leading indicator of an organ system's ability to detect and transmit pain. The involvement of neuropeptides in pain transmission was not known in 1973. Nor were they part of the discussion when science originally formulated a proposition that there was a need for a sensory cortex for pain perception. Substance P is a pain transmitter and a neuromodulator in the primary cortical areas of sensorial integration.[117] Substance "P" was found to be present in neuronal elements of the human cortex at eighteen weeks gestation (the earliest time point tested).[118] This is significantly earlier than the defendants 26 week claim.

[117] Manolidis, L.; Baloyannis, S.; and Mandolidis, S. "Substance P in the Acoustic Area of the Cortex During Neuronal Development and Maturation." *Acta Otolaryngol* (stockh) 107(1989: 375-382, at p. 375.

[118] Manolidis, L.; Baloyannis, S.; and Mandolis, S. "Substance P in the Acoustic Area of the Cortex During Neuronal Development and Maturation." *Acta Otolaryngol* (stockh) 107(1989): 375-382, at p. 375.

For the existence of pain there presumably has to be an event and detection of that event outside the brain region. It is a very important and recent observation, that, using immunohistochemistry techniques, substance "P" positive neurons and nerve fibers were detected at eleven weeks post fertilization, and enkephalin positive neurons and nerve fibers were detected at thirteen weeks post fertilization. The levels of substance "P" and enkephalin at twelve to fourteen weeks were comparable to levels of the full term baby. In 1990, as a result of this revelation using molecular biological techniques, researchers have stated that:

> "the importance of the early appearance of enkephalin and substance "P" neurons and fibers of the pain pathways in the major subnuclei connecting with the cardiovascular, gastrointestinal and respiratory functions in the human has to be stressed." [119]

None of the significant techniques used in the cited study were available in 1973 or significantly thereafter. Others have found Substance "P" present as early as five weeks gestation and has

[119] Yew, D.T., et. al. *Development and Localization of Enkephalin and Substance P in the Nucleus of the Tractus Solitarius in the Medulla Oblongata of Human Fetuses*, Neuroscience 34(1990) p.491-498, at p. 491.

been detected at all stages of development wherever examined from that point thereafter.[120]

In the last six years modern science has examined the relationship of substance P and pain.[121] It has been found that substance "P" (a neuropeptide), an important excitatory transmitter of pain pathways, is clearly present in the human at five weeks post fertilization.[122] Nervous system development (and function) occurs well before 26 weeks gestation.

If a neocortex is needed for pain detection, then the fact that neocortex development begins at eight weeks gestation in the

[120] Tam, P.K.; and Lister, J. "Maldevelopment of Spinal Cord - Substance P in Spina Bifida." *Z Kinderchir* 41(1986): 206-208. Wadhwa, S.; Rizvi, T.A.; and Bijiani, V. "Substance P-Immunoreactivity in the Developing Human Retinogeniculate Pathway." *Neurosci Lett* 89(1988): 25-30, at p. 25. Paulin, C.; Charnay, Y.; Chayvialle, J.A.; Daniere, S.; and Dubois, P.M. "Ontogeny of Substance P in the Digestive Tract, Spinal Cord and Hypothalamus of the Human Fetus." *Regul Pept* 14(1986): 145-153, at p. 145.

[121] Uddman, R.; Edvinsson, L.; Jansen, I.; Stiernholm, P.; Jensen, K.; Olesen, J.; and Sunder, F. "Peptide-Containing Nerve Fibers in Human Extracranial Tissue: A Morphological Basis for Neuropeptide Involvement in Extracranial Pain?" *Pain* 27(1986): 391-399.

[122] Luo, C.B.; Zheng, D.R.; Guan, Y.L.; and Yew, D.T. "Localization of Substance P and Enkephalin by Immuno histochemistry in the Spinal Cord of the Human Fetus." *Neuroscience* 27(1988): 989-993, at p. 989.

fetus and has all its neurons by twenty weeks is pertinent.[123] Some may assume that a degree of cortical maturity is necessary for pain perception. That assumption led physicians to presume that newborns did not feel pain when Roe v. Wade was decided. Clearly, that assumption was wrong.

Until recently, science was incapable of even formulating questions no less deriving answers concerning the role of chemicals in the transmission of pain. In fact, science had not even discovered the existence of most of those key chemicals when *Roe v. Wade* was determined. A recent review (1991) summarized the current state of understanding of the function and development of the brain in the developing human.[124] There the authors observe:

> "neuronal multiplication occurs mainly from the tenth to twentieth gestational weeks, after which no new nerve cells are formed, though neuronal arborization and the information and reorganization of synapses continues until adulthood...Somatosensory functions are developed at an early stage. The pain threshold is assumed to be lower in

[123] Marin-Padilla, M. "Structural Organization of the Human Cerebral Cortex Prior to the Appearance of the Cortical Plate." *Anat Embryol* 166(1983): 21-40, at p. 21.

[124] Lagercrantz, H.; and Forssberg, H. "Functional Development of the Brain in the Fetus and the Infant." *Lakartidningen* 88(1991): 1880-1885.

> the fetus than in the adult. In man general fetal movements appear from the eighth gestational week and more complex movements such as sucking, swallowing and breathing during the tenth to twelfth gestational weeks. These movements are generated by neuronal networks."[125]

Using modern techniques that were used to identify different types of nerve synapses, as well as different types of neurotransmitters, in samples taken from 8 to 37 week old fetus[126] it is concluded that the morphological substrate (the necessary pieces) for nociception (pain detection) in the spinal cord exists at very early developmental stages in man. As early as the end of the 1st trimester, the thalamus, third ventricle, midbrain, brain stem, and cerebellar hemispheres are developed and their appearance, besides physical size, will go unchanged throughout the rest of fetal development.[127] Independently, others have also observed many of the important parts of the puzzle early on in development. At seven weeks gestation cutaneous sensory

[125] Lagercrantz, *supra*, 1991 at 1880-5.

[126] Rizvi, T.; Wadhwa, S.; and Bijiani, V. "Development of Spinal Substrate for Nociception" *Pain 4(1987-suppl.): S195.*

[127] Filly, R.A. "Sonographic Anatomy of the Noraml Fetus" In *The Unborn Patient* 2nd ed., edited by M.R. Harrison et al., 92-130, Philadelphia: W.B. Saunders Co., 1991, at p. 122.

receptors appear in the fetus. This development is preceded by the development of synapses or junctions between sensory nerve fibers and interneurons of the spinal cord.[128] A basic sensory response loop is present extremely early in human development. It is noteworthy that, with ultrasound, we can observe movement by the fetus away from outside stimulation by the eighth week.[129] Brain activity, as detected by electroencephalography, is also present at eight weeks gestation.[130] Nature in its wise way prepares the nervous system first so that all the other systems can develop and function as they should.[131]A basic sensory response loop is clearly present shortly after eight weeks gestation. This fact is scientifically logical since pain detection and response to pain are very important parts of a human's ability to survive.

[128] Anand, K.J.S.; and Hickey, P.R. "Pain and Its Effects in the Human Neonate and Fetus." *N Engl J Med* 317(1987): 1321-1329, at p. 1322.

[129] Flower, M.J. "Neuromaturation of the Human Fetus." *J Med Philos* 10(1988): 237-351.

[130] Goldenring, J.M. "Development of the Fetal Brain." *N Engl J Med* 307(1982): 564, at p. 564; Flower, M.J., *supra*.

[131] Kalvger, G.; and Kalvger, M.F. Human Development: *The Span of Life.* St. Louis: The C.V. Mosby Company, 1974, at p. 35.

It was recently discovered that many behaviors characteristic of newborns are clearly present in children with anencephaly (children born without a developed cortex).[132] Previously, these behaviors had erroneously been ascribed to cerebral hemispheric activity[133] (including activity described in the defendant's brief as needed for neocortical reception of body sensations).

Anencephalic children are born without a cerebral cortex.[134] Their expected post birth lifespan ranges from a few hours to a few months.[135] During their post birth lives these children breath spontaneously and have a grasp response.[136] They respond to noxious stimuli known to cause pain by avoidance, by

[132] The Medical Task Force on Anencephaly, (Stumpf, D.A., et al.) "The Infant with Anencephaly" *N Eng J Med* 322(1990): 669-674.

[133] Id.

[134] Shewmon, D.A.; Capron, A.M.; Peacock, W.J.; and Schulman, B.L. "The Use of Anencephalic Infants as Organ Sources: A Critique." *JAMA* 261(1989): 1773-1781.

[135] Stumpf, D.A., Chair of Medical Task Force on Anencephaly "The Infant With Anencephaly." *N Eng J Med* 322(1990): 669-674.

[136] Ashwal, S.; Peabody, J.L.; Schneider, S.; Tomasi, L.G.; Emery, J.R.; and Peckham, N. "Anencephaly: Clinical Determination of Brian Death and Neuropathologic Studies." *Pediatr Neurol* 6(1990): 233-239.

withdrawal and by crying.[137] They breath, cough, hiccup, smile, grimace, yawn and suck. In a recent study of twelve anencephalic infants, all twelve responded to pain, all had an exaggerated sustained response to touch, all twelve evidenced spontaneous movement, and all twelve breathed spontaneously.[138] Additionally, seven of the twelve responded to a stimulation at their mouth towards the stimulus (rooting response) and seven of the twelve had a sucking response.[139] Spontaneous movement in the fetus begins between six and seven and one-half weeks gestation.[140]

[137] Stumpf, D.A., Chair of Medical Task Force on Anencephaly. "The Infant With Anencephaly." *N Eng J Med* 322(1990): 669-674. Shewman, D.A.; Capron, A.M.; Peacock, W.J.; and Schulman, B.L. "The Use of Anencephalic Infants as Organ Sources: A Critique." *JAMA* 261(1989): 1773-1781. Van Assche, F.A. "Anencephalics as Organ Donors." *Am J Obstet Gynecol* 163(1990): 599-600. Ashwal, S.; Peabody, J.L.; Schneider, S.; Tomasi, L.G.; Emery, J.R.; and Peckham, N. "Anencephaly: Clinical Determination of Brain Death and Neuropathologic Studies." *Pediatr Neurol* 6(1990): 233-239.

[138] Ashwal, S.; Peabody, J.L.; Schneider, S.; Tomasi, L.G.; Emery, J.R.; and Peckham, N. "Anencephaly: Clinical Determination of Brain Death and Neuropathologic Studies." *Pediatr Neurol* 6(1990): 233-239.

[139] *Id.*

[140] de Vries, J.I.P.; Visser, G.H.A.; and Prechtl, H.F.R. "The Emergence of Fetal Behavior. I. Qualitative Aspects." *Early Hum Dev* 7(1982): 301-322. Flower, M.J. "Neomaturation of the Human Fetus." *J Med & Phil* 10(1985): 237-251.

Stimulation of the mouth area resulting in a response towards the stimulus is seen in the child at 9 weeks gestation and sucking is present at 11 weeks gestation.[141] Based upon these behaviors and their incidence in this study, one must conclude that the fetus at 6 to 11 weeks gestation is neurologically developed to a point at least equivalent to the twelve anencephalic children described above. They are all capable of experiencing pain.

In conclusion, the biochemical evidence, unforeseen and unavailable in 1973, supports the very early development of pain detection in the fetus. This evidence is consistent with observed fetal behavior (using real time ultrasound), which shows the fetus moving away from painful stimuli at 8 weeks gestation. Modern instrumentation picks up brain wave activity also at 8 weeks gestation. Together these observations point to an active sensory system present and functioning in the fetus at 8 weeks gestation. Finally, the recent studies on full term anencephalic infants reveal these infants to be neurologically comparable to 6-11 week old fetuses. All of these infants are capable of experiencing pain.

[141] Flower, M.J. "Neomaturation of the Human Fetus." *J Med & Phil* 10(1985): 237-251.

In summary: There is a scientific consensus that a unique human life begins at conception. There is a scientific consensus that pain is experienced after 22-26 weeks gestation. Scientific evidence, unavailable until very recently is consistent with the conclusion that pain is experienced as early as eight weeks gestation. Abortion then results in the painful death of a unique human being, whose life is irreplaceable.

POINT II

ONCE IT IS RECOGNIZED THAT, AS A MATTER OF FACT, A CHILD IS A COMPLETE AND SEPARATE HUMAN BEING PRIOR TO BIRTH CAPABLE OF EXPERIENCING PAIN. ALL EXISTING PRINCIPLES OF CONSTITUTIONAL LAW COMPEL A FINDING THAT THE UNBORN CHILD POSSESSES RIGHTS UNDER THE CONSTITUTION OF THE STATE OF NEW JERSEY AND THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES. UNDER NEW JERSEY LAW THE LIFE OF A CHILD BEGINS AT CONCEPTION AND THE CHILD ENJOYS A CONSTITUTIONAL RIGHT TO LIVE.

A.

UNDER NEW JERSEY LAW THE CHILD HAS A RIGHT TO LIVE FROM THE MOMENT OF CONCEPTION.

1.

In addition to the showing that there is a universal acceptance of the scientific facts to support the factual conclusion that the life of a child begins at conception, New Jersey has found, as a matter of law, that the life of a child begins at conception.

The Supreme Court of New Jersey has recognized that the unborn child is a separate person and the child is in existence from the moment of conception. *Smith v. Brennan*, 31 N.J. 353, at 362-364, 157 A.2d 497 (1960). In *Smith v. Brennan*, that Court stated:

> "Medical authorities have long recognized that a child is in existence from the moment of conception and not merely a part of its mother's body." 31 N.J. at 362.

The court further observed:

> "It is clear medical authorities recognize that before birth an infant is a distinct entity and that the law of the land recognizes that rights which he will enjoy when born can be violated before his birth." 31 N.J. at 364.

There is no authority in New Jersey which has overruled the legal principles of *Smith* that (1) the life of a child begins at conception and (2) the child possesses rights prior to birth.[142]

2.

[142] See discussion under this point, Section (A)(3) at Pb. 80 to 86.

The New Jersey rule of law, that the life of a child begins at conception, is consistent with virtually all the states and the two branches of the Federal Government which have made legal and factal findings specifically on this point. In addition to New Jersey, thirty-six other jurisdictions have found that the life of a child begins at conception:[143] Alabama,[144] Arizona,[145] Arkansas,[146] California,[147] Connecticut,[148]

[143] There appears to be, perhaps, one state that found otherwise (Kansas) and a few which have declined to address the question.

[144] *Trent v. State*, 15 Ala. App. 485, 488, 73 So. 834, 836 (1916); *Wolfe v. Isbell*, 291 Ala. 327, 331, 280 So.2d 758, 761 (1973); *Eich v. Twon of Gulf Shores*, 293 Ala. 95, 98-99, 300 So. 2d 354, 356-57 (1974).

[145] *Nelson v. Planned Parenthood Center of Tucson*, 19 Ariz. App. 142, 505 p.2d 580, 586 (1973).

[146] Ark. Const. Amend. 68, sec. 2 ('[t]he public policy of Arkansas is to protect the life of every unborn child from conception until birth, ...').

[147] Cal. Civ. Code Sec. 29 (West 1982) ("[a] child conceived but not yet born, is to be deemed an existing person so far as may be necessary for its interests in the even if its subsequent birth") *Scott v. McPheeters*, 33 Cal. App. 2d 629, 634, 92 P.2d 678, 681 (1939).

[148] *Simon v. Mullin*, 34 Conn. Sup. 139, 147, 380 A.2d 1353, 1357 (1977); Conn. Gen. Stat., Ann. Sec. 53-31(a)(1985) ("[t]he public policy of the state and the interest of the legislature is to protect and preserve human life from the moment of conception.") (rep. by P.A. 90-113, sec. 4 (1990)).

Delaware,[149] District of Columbia,[150] Florida,[151] Georgia,[152] Idaho,[153] Illinois,[154] Indiana,[155] Kentucky,[156] Louisiana,[157] Maine,[158] Maryland,[159] Massachusetts,[160]

[149] *Scott v. State*, 49 Del. 401, 409-10, 117 A.2d 831, 835-36 (1955).

[150] *Bonbrest v. Kotz*, 65 F. Supp. 138, 140 (D. D.C. 1946); *Greater Southeast Community Hosp. v. Williams*, 482 A.2d 394, 396 (D.C. Ct. App. 1984).

[151] *Day v. Nationwide Mut. Ins. Co.*, 328 So.2d 560, 561 (1976).

[152] *Hornbuckle v. Plantation Pipe Line Co.*, 212 Ga. 504, 504-05, 93 S.E.2d 727, 728 (1956); *Morrow v. Scott*, 7 Ga. 535, 537 (1849); *Gulf Line Ins. Co. v. Brown*, 181 Ga. App. 72, 74, 351 S.E.2d 267, 269 (1986).

[153] *Nash v. Meyer*, 54 Idaho 283, 301, 31 P.2d273, 280 (1934) (construing state abortion law); *Blake v. Cruz*, 108 Idaho 253, 261, 698 P.2d 315, 323 (1984) (Bistline, J., concurring in part and dissenting in part).

[154] *Renslow v. Mennonite Hospital*, 67 Ill.2d 348, 352-53, 367 N.E.2d 1250, 1252-53 (1977).

[155] *Cheaney v. State*, 259 Ind. 138, 145, 285, N.E.2d 265, 268 (1972); *Cowe v. Forum Group, Inc.*, 541 N.E.2d 962, 967-68 (Ind. App. 1989).

[156] Ky. Rev. Stat. Ann. sec. 311.710(5) (Michie/Bobbs-Merrill 1990); Ky. Rev. Stat. Ann., sec. 311.720(5), (6) (abortion regulations); Kentucky Constitutional Convention Call (H.R. Res. 7, 1978 Gen. Assembly, Reg. Sess., 1978 Ky. Acts 1401).

[157] La. Stat. Ann., sec. 14.2(7) (West 1986); *Danos v. St. Pierre*, 383 So.2d 1019, 1027 (La. App.), aff'd, 402 So.2d 633 (La. 1991) (Lottinger, J., concurring); *Johnson v. Southern New*

Michigan,[161] Minnesota,[162] Missouri,[163] Montana,[164] Nebraska,[165] Nevada,[166] New Hampshire,[167] New

Orleans Light and Traction Co., Docket 9048 (La. App. Orl. Dec. 10, 1923); *Valence v. La. Power & Light Co.*, 50 So.2d 847 (La. App. 1951); *Danos v. St. Pierre*, 383 So.2d 1019, 1027 (La. App.).

[158] *Smith v. State*, 33 Me. 48, 57 (1851).

[159] *Damasiewicz v. Gorsuch*, 197 Md. 417, 438, 79 A.2d 550, 559 (1951); *Group Health Ass'n v. Blumenthal*, 295 Md. 104, 119, 453 A.2d 1198, 1207 (1983).

[160] *Commonwealth v. Cass*, 392, Mass. 799, 801, 467 N.E.2d 1234, 1325 (1984); *Torigan v. Watertown News Co., Inc.*, 352 Mass. 446, 449, 225 N.E.2d 926, 927 (1967).

[161] *Womack v. Buchhorn*, 384 Mich. 718, 725, 187 N.W.2d 218, xxx (1971); *O'Neil v. Morse*, 385 Mich. 130, 188 N.W.2d 785 (1971).

[162] Minn. Stat. Ann., secs. 609.266, 609.2661 through 609.2665, 609.267, 609.2671, 609.2672, 609.268 (1987 & 1992 Supp.); *Verkennes v. Corniea*, 229 Minn. 365, 369, 38 N.W.2d 838, 840 (1949).

[163] Mo. Ann. Stat., sec. 1.205.1(1) (Vernon Supp. 1992); Mo. Ann. Stat., sec. 188.015(6) (Vernon Supp. 1992); *Rodgers v. Danforth*, 486 S.W.2d 258, 259 (Mo. 1972); *Steggall v. Morris*, 363 Mo. 1224, 1229-33, 258 S.W.2d 577, 579-81 (1953).

[164] Mont. Code Ann., sec. 50-20-102 (1991); Mont. Code Ann., sec. 41-1-103 (1991).

[165] Neb. Rev. Stat., sec. 28-325 (1989); *Hans v. State*, 147 Neb. 67, 72, 22 N.W.2d 385, 389, on rehearing, 147 neb. 73, 25 N.W.2d 35 (1946).

Jersey,[168] New York,[169] North Carolina,[170] North Dakota,[171] Ohio,[172] Oklahoma,[173] Oregon,[174]

[166] *White v. Yup*, 85 Nev. 527, 536-37, 458 P.2d 617, 623 (1969); Nevada Constitutional Convention Call (S.J. Res. 27, 60th Legis., 1979 Nev. Stat. 2014).

[167] *Bennett v. Hymers*, 101 N.H. 483, 485, 147 A.2d 108, 110 (1958); *Wallace v. Wallace*, 120 N.H. 675, 679, 421 A.2d 134, 136 (1980).

[168] *Smith v. Brennan*, 31 N.J. 353, 362, 157 A.2d 497, 502 (1960); Giardina v. Bennett, 111 N.J. 412, 545 A.2d 139 (1988); *State v. Gedicke*, 43 N.J.L. 86, 89-90 (1881); New Jersey Constitutional Convention Call (Act of Apr. 21, 1977, S. 1271).

[169] *Kelly v. Gregory*, 282 A.D. 542, 543-44, 125 N.Y.S.2d 696, 697 (1953) (rejecting viability requirement in cause of action for prenatal injuries); but see, Bryn v. City Hosp. of N.Y. City, 31 N.Y. 2d 194, 199, 335 N.L.S. 2d 390, 392, 286 N.E. 2d 887, 888 (1972).

[170] *DiDonato v. Wortman*, 320 N.C. 423, 435, 358 S.E.2d 489, 496 (1987) (recognizing cause of action for wrongful death of a viable unborn child); *Corkey v. Edwards*, 322 F. Supp. 1252 (W.D.N.C. 1971).

[171] N.D. Cen. Code, secs. 12.1-17.1-02 through 12.1-17.1-06 (Supp. 1991); *Hopkins v. McBane*, 359 N.W.2d 862, 865 (rejecting viability requirement in cause of action for prenatal injuries and live birth requirement in wrongful death actions).

[172] *Steinberg v. Brown*, 321 F.Supp. 741, 746 (N.D. Ohio 1970) (construing criminal abortion law); *Williams v. Marion Rapid Transit*, 152 Ohio St. 114, 128-29, 39 Ohio Ops. 433, 439-40, 87 N.E.2d 334, 340 (1949).

[173] Okla. Stat. Ann., tit. 63, sec. 1-730(2) (1984) (abortion regulations); *Evans v. Olson*, 550 P.2d 924, 925 (1976) (rejecting

Pennsylvania,[175] Rhode Island,[176] South Dakota,[177] Texas,[178] Utah,[179] Virginia,[180] and Wisconsin.[181]

viability requirements in cause of action for prenatal injuries and live birth requirement in wrongful death actions).

[174] *State v. Ausplund*, 86 Or. 121, 131-132, 167 P. 1019, 1022-23 (1917) (construing criminal abortion law); *Mallison v. Pomeroy*, 205 Or. 690, 696-97, 291 P.2d 225, 228 (1955) (recognizing cause of action for prenatal injuries); *Libbee v. Permanente Clinic*, 268 Or. 258, 518 P.2d 636, 520 P. 2d 361 (1974) (recognizing cause of action for the wrongful death of a viable stillborn child).

[175] Pa. Cons. Stat. Ann., tit. 18, sec. 3203 (Purdon's 1992 Supp.); *Amadio v. Levin*, 509 Pa. 199, 204, 501 A.2d 1085, 1087 (1985) (rejecting both viability and live birth requirements in wrongful death actions); *Sinkler v. Kneale*, 401 Pa. 267, 273, 164 A.2d 93, 96 (1960) (rejecting viability requirement in cause of action for prenatal injuries).

[176] R.I. Gen. Laws, sec. 11-3-4 (1981) (1973 R.I. Pub. Laws 68-70, ch. 15, sec. 2) (criminal abortion statute); *Sylvia v. Gobeille*, 101 R.I. 76, 79, 220 A.2d 222, 223-24 (1966) (rejecting viability requirement in cause of action for prenatal injuries); *Presley v. Newport Hospital*, 117 R.I. 177, 183, 365 A.2d 748, 751 (1976) (rejecting live birth requirement in wrongful death of a viable unborn child).

[177] *State v. Munson*, 86 S.D. 663, 669, 201 N.W.2d 123, 126 (1972), vacated and remanded, 410 U.S. 950 (1973) (construing criminal abortion law).

[178] *Thompson v. State*, 493 S.W.2d 913, 918 (Tex. Crim. App. 1971) vacated and remanded, 410 U.S. 950 (1973) (construing criminal abortion law); *Leal v. C.C. Pitts Sand and Gravel, Inc.*, 419 S.W.2d 820, 822 (Tex. 1967) (recognizing cause of action for wrongful death for prenatal injuries where death occurs after live birth).

A specific list of precise quotations from each of these states which supports the conclusion that the life of a person begins at conception is found at the back of this brief in Appendix C.

In addition, although the United States Supreme Court stated in *Roe* in 1973 that it was unable, at that time, to state when life began, the two other branches of the federal government have since made specific findings or declarations that the life of a person begins at conception. In 1981 the subcommittee on Separation of Power of the Committee on the Judiciary of the United States Senate published a report, following substantial hearings, in which the committee found, as a matter of scientific fact, that life begins at conception:

[179] Utah Code Ann., sec. 76-7-301.1(1) (1992) (preamble to Utah abortion law); Sec. 76-7-301.1(2), sec. 76-7-301.1(3); Utah Code Ann., sec. 76-5-201(1) (1992 Supp.).

[180] *Kalafut v. Gruver*, 239 Va. 278, 283-84, 389 S.E.2d 681, 683-84 (1990) (rejecting viability rule in cause of action for prenatal injuries or for wrongful death following live birth).

[181] Wis. Stat. Ann., sec. 940.04(6) (West 1982); *Puhl v. Milwaukee Auto Ins. Co.*, 8 Wis.2d 343, 99 N.W.2d 163, 170 (1959) (rejecting viability requirement in cause of action for prenatal injuries); *Kwaterski v. State Farm Mut. Auto. Ins. Co.*, 34 Wis.2d 14, 21, 148 N.W.2d 107, 111 (1966) (rejecting born alive requirement in wrongful death actions).

> "... today the facts are beyond dispute. Physicians, biologists, and other scientists agree that conception marks the beginning of the life of a human being ..."[182]

On January 14, 1988 President Reagan issued a proclamation, No. 5761, which stated in part:

> "... I, Ronald Reagan, president of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim and declare the unalienable personhood of every American from the moment of conception until natural death, and ... I will take care that the Constitution and laws of the United States are faithfully executed for the protection of American's unborn children ..."[183] (emphasis added)

In short, the conclusion that the life of a child begins at conception is supported by a clear consensus in the scientific community, as a matter of scientific fact, and is supported by a virtual unanimity of jurisdictions as a matter of law. This overwhelming authority supports the soundness of New Jersey law under *Smith v. Brennan* that the life of a child beings at conception.

3.

[182] Report on Human Life Bill, Subcommittee on Separation of Powers Committee on the Judiciary United States Senate (97th Cong. 1st Sess. 1981) p. 7.

[183] See Proclamation No. 5761 Exhibit W at 82a.

Under existing New Jersey law a child has a constitutional right to live from the moment of conception and the state's policy [absent *Roe*] is to protect the life of a child prior to birth. In *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*, 42 N.J. 421, 201 A.2d 537 (1964), the New Jersey Supreme Court found that the state had an interest in protecting the life of a child prior to birth. The court found that that right was personalized to the child and the court appointed a guardian ad litem. 42 N.J. at 423, 424. The health of the child was protected while the child was in the mother's womb even over the objection of the baby's mother.

This right of the child found in *Raleigh Fitkin* is reflective not only of the strong policy of New Jersey, but the legal conclusion that children enjoy the right to live under our state constitution. In *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d (1967) the New Jersey Supreme Court stated that a child possesses a right to life:

> "The right to life is inalienable in our society...we are not faced here with the necessity of balancing the mother's life against that of her child. The sanctity of a single human life is the decisive factor...(that) it may have been easier for the mother and less expensive for the father to terminate the life of the child while he was an embryo, but these alleged detriments cannot stand against the preciousness of a single human life..." 49 N.J. at 30, 31.

As recently as July, 1992 the New Jersey Supreme Court reaffirmed that interpretation of *Gleitman*. Writing for the majority in *Hummel v. Reiss*, 129 N.J. 118 (1992) Justice Clifford wrote:

> "In *Gleitman* the Court observed that '[a] child need not be perfect to have a worthwhile life,' (citation omitted) and found that, '[e]ugenic considerations are not controlling,' ibid., noting that considerations of financial burden to the father and convenience of the mother did not outweigh the child's right to live, albeit imperfectly." 49 N.J. at 30-31, 227 A.2d 689 (emphasis added). *Hummel v. Reiss*, 129 N.J. at 126.

Even after the New Jersey Supreme Court, in 1979, found itself compelled to extend a tort action to a couple for wrongful birth because of the decision of the U.S. Supreme Court in *Roe v. Wade* in 1973, that court acknowledged the child's constitutional right to live under the state constitution and underscored the state's policy of preferring life over non-existence.

> "One of the most deeply held beliefs of our society is that life...is more precious than nonlife (citation omitted)...concrete manifestations of this belief are not difficult to discover. Documents which set forth principles upon which our society are founded are replete with references to the sanctity of life. The Federal Constitution characterizes life as one of the three fundamental rights of which no one can be deprived without due process of law...our own constitution proclaims that the 'enjoyment and defending of life' is a natural right. N.J. Const. (1947), ART. 1, SEC. 1. The declaration of independence states that the primacy of man's 'inalienable' right to life is a 'self-evident truth.' Nowhere in these documents is there to be found an

> indication that the life of persons suffering from handicaps are to be less cherished than those non-handicapped beings. *Berman v. Allan*, 80 N.J. 420, 429 (1979) (emphasis added).

It is clear that New Jersey considers a child a person from the moment of conception who enjoys the right to live. In addition, the constitutional right to defend life is part of the child's rights. N.J. Const. (1947), ART. 1, SEC. 1.

This right, of course, is independent of the right the child possesses prior to birth under the Federal Constitution (see discussion below under this point Sec. B to D). To the extent the current federal law could be construed against the child and it eclipses the state right, the state constitution would still protect the child from "viability" to birth. *Roe v. Wade*, 410 U.S. at 164, 165, 93 S.Ct. at 732 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, ___ U.S. ___, 112 S.Ct. at 2804, Slip Op. at 4 (1992).

That the child is an individual who enjoys rights after viability, despite *Roe*, was specifically stated by the New Jersey Supreme Court in the case of *In the Matter of Baby M.* The court observed:

> "The balance struck in *Roe v. Wade* recognizes increasing rights in the fetus..." *Baby M.*, 109 N.J. 396, at 449 N.13, (1988).

It is clear that the unborn child is a person who possessed rights.[184]

"Viability" happens to be, whether discussed in the context of the state issues or that of the federal, an arbitrary point of reference that has no true relevence of a factual, moral or legal nature. That it has taken on a significance and is really nothing other than a rationalization derived from the inability of the U.S. Supreme Court to determine when life began.

Factually, it is now clear that the child is as separate and complete before viability as after (see Point I(B)). When modern medicine performs operations, under anesthesia, on children who are only eighteen weeks old from conception, is there any true doubt that these children are complete, separate, unique human beings?

Morally, brutal and painful destruction of the lives of these children is no less reprehensible than if they reached the age of 23 weeks [or earlier as the "viability" point progresses forward.]

[184] We note also that in 1977 the New Jersey legislature passed an act which specifically requested the U.S. Cong. to call a convention to propose an amendment to the U.S. Constitution to deem every human being in the country a person from the moment of conception. New Jersey Constitutional Convention call (act of APP. 21, 1977, S.1271).

Legally, there is no sound principle of common law or constitutional law which justifies the taking of the life of one class of children, but not the other. That a child is dependent upon his or her mother does not change that reality.

In *Smith v. Brennan*, the New Jersey Supreme Court quoted with approval Chief Justice Brogan's dissent in *Stemmer v. Kline*, 128 N.J.L. 455, 466, 26 A2d 489, 687 (1942):

> While it is a fact that there is a close dependence by the unborn child on the organism of the mother, it is not disputed today that the mother and the child are two separate and distinct entities; that the unborn child has its own system of circulation of the blood separate and apart from the mother; that there is no communication between the two circulation systems; that the heart beat of the child is not in tune with that of the mother but is more rapid; that there is no dependence by the child on the mother except for sustenance. <u>It might be remarked here that even after birth the child depends for sustenance upon the mother or upon a third party. It is not the fact that an unborn child is part of the mother, but that rather in the unborn state it lived with the mother, we might say, and from conception on developed its own distinct, separate personality</u>. [emphasis added.]

This very point, that dependence is irrelevant to the child's separate existence was eloquently made in *Kelly v. Gregory*, 282 A.D. 542, 543-44, 125 N.Y.S. 2d 696, 697 (1953):

> The mother's biological contribution from conception on is nourishment and protection; but the foetus has become a separate organism and remains so throughout its life. That it may not live if its protection and nourishment are

> cut off earlier than the viable stage of its development is not to destroy its separability; it is rather to describe conditions under which life will not continue. Succeeding conditions, exist, of course, that have that result at every stage of its life, post-natal as well as pre-natal. Id. at 544, 125 N.Y.S. 2d at 697.

Most of the states which have specifically addressed the question have found as a matter of law that viability has no factual or legal relevance. *Wolfe v. Isbell*, 291 Ala. 327, 331, 280 So.2d 758, 761 (1973) (Ala.), *Simon v. Mullin*, 34 Conn. Sup. 139, 380 A.2d 1353 (1977) (Conn.); *Greater Southeast Community Hosp. v. Williams*, 482 A.2d 394, 396 (D.C. Ct. App. 1984); *Day v. Nationwide Mut. Ins. Co.*, 328 So.2d 560, 561 (1976) (Fla.); *Renslow v. Mennonite Hospital*, 67 Ill. 2d 348, 352-53, 367 N.E. 2d 1250, 1252-53 (1977); *Cheaney v. State*, 259 Ind. 138, 145, 285, N.E.2d 265, 268 (1972); *Cowe v. Forum Group, Inc.*, 541 N.E.2d 962, 967-68 (Ind. App. 1989); *Johnson v. Southern New Orleans Light and Traction Co.*, Docket 9048 (La. App. Orl. Dec. 10, 1923); *Valence v. La. Power & Light Co.*, 50 So.2d 847 (La. App. 1951); *Smith v. State*, 33 Me. 48, 57 (1851); *Group Health Ass'n v. Blumenthal*, 295 Md. 104, 119, 453 A.2d N.E.2d 926, 927 (1967); *Torigan v. Watertown News Co., Inc.*, 352 Mass. 446, 449, 225 N.E.2d 926, 927 (1967); *Womack v. Buchhorn*,

384 Mich. 718, 725, 187 N.W.2d 218 (1971); *Steggall v. Morris*, 363 Mo. 1224, 1229-33, 258 S.W.2d 577, 579-81 (1953); N.D. Cen. Code, secs. 12.1-17.1-02 through 12.1-17.1-06 (Supp. 1991); *Hopkins v. McBane*, 359 N.W.2d 862, 865 (N.D.); *Williams v. Marion Rapid Transit*, 152 Ohio St. 114, 128-29, 39 Ohio Ops. 433, 439-40, 87 N.E.2d 334, 340 (1949); *Steinberg v. Brown*, 321 F.Supp. 741, 746 (N.D. Ohio 1970); *Evans v. Olson*, 550 P.2d 924, 925 (1976) (Okla.); *Amadio v. Levin*, 509 Pa. 199, 204, 501 A.2d 1085, 1087 (1985), *Sinkler v. Kneale*, 401 Pa. 267, 273, 164 A.2d 93, 96 (1960); *Sylvia v. Gobeille*, 101 R.I. 76, 79, 220 A.2d 22, 223-24 (1966); *Kalafut v. Gruver*, 239 Va. 278, 283-84, 389 S.E.2d 681, 683-84 (1990); and *Puhl v. Milwaukee Auto Ins. Co.*, 8 Wis.2d 343, 99 N.W.2d 163, 170 (1959).

Smith v. Brennan, in explaining the illogical nature of extending an arbitrary significance to "viability" observed:

> The most important consideration, however, is that the viability distinction has no relevance to the injustice of denying recovery for harm which can be proved to have resulted from the wrongful act of another. Whether viable or not at the time of the injury, the child sustains the same harm after birth, and therefore, should be given the

same opportunity for redress. Id. at 367, 157 A.2d at 504.[185]

The mother, it might be added, is not the giver or creator of life, any more than the "state". She is the trustee of the child's life. As such, her unique relationship, as with all persons who are placed in, or who accept, the role of one in a position of trust, she has the greatest obligations to the subject of that relationship, the child. That the child is dependent upon her for nourishment and protection is no different later in life. That she is the only person who can provide it at one stage of the child's life simply places her in a greater position of trust. Dependence creates obligations, not liberty to terminate life. The decisive factor which creates obligation and the trust relationship is the free choice she made by intentionally accepting conception, or voluntarily accepting the risk of it.

B.

THE RIGHT TO LIVE DEPENDS ONLY UPON THE EXISTENCE OF AN INDIVIDUAL.

[185] *Giardina v. Bennett*, 111 N.J. 412, 545 A.2d 139 (1988) is not contrary. *Giardina* merely construes the wrongful death statute and the legislative intent to change the common law to create a new form of tort action for specific losses based upon existing relationships and dependencies.

1.

The right to live is the most basic, unique and inalienable right within our society. It is not derived or dependent upon a political grant but flows from the fact of an individual's existence. Neither the state nor the federal governments have the power to impose restrictions or qualifications that result in creating a class of human beings excluded from the enjoyment of this right. The individual lives of people give life to government and government exists for them. In short, the unique nature of the right itself prohibits qualification by classification.

In New Jersey this principle is made plain, both by the language of the constitution, and by the case law which construes it. Art. I, Section 1, states in relevant part:

> "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life..."

Our Supreme Court has stated, concerning this clause, that:

> "Our own constitution proclaims that the 'enjoyment and defending of life' is a natural right. N.J. Const. (1947), Art. I, Sec. 1." *Berman v. Allan*, 80 N.J. 420, 429 (1979).

Our constitution acknowledges, therefore, that the right to live is a grant of nature, not government.

In founding the United States of America the congress saw the right to life as beyond the reach of government. The Declaration of Independence states that man's 'unalienable' right to life is a 'self-evident truth.' Specifically, it states:

> "We hold these truth to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are life ..."

But the founders made plain that the basic function of the new government was to protect that right, that government existed for that very purpose:

> "That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the government..." In Congress, July 4, 1776; "A Declaration of the Representatives of the United States of America, in General Congress assembled."

Inherent in this concept, embodied in both the state constitution and the document which both founded and declared the purpose of our federal government, is that no political body has the power to redefine or limit the class of human beings to which the right attaches by one's very existence. This is the very meaning of the word "unalienable" - that it cannot be separated from the being.

The framers of the Thirteenth and Fourteenth Amendments both understood and acknowledged this principle that government was powerless to deprive an individual human being of the unalienable right to live.

Thus Representative Thaddeus Stevens, on the date the thirteenth amendment was declared ratified, proclaimed:

> This is man's Government; the Government of all men alike; not that all men will have equal power and sway within it. Accidental circumstances, natural and acquired endowment and ability, will vary their fortunes. But equal rights to all the privileges of Government is *innate in every immortal being, no matter what the shape or color of the tabernacle which it inhabits.*

Cong. Globe, 39th Cong., 1st Sess. 74(1865) (emphasis added).

Likewise Representative John A. Bingham, author of section one of the fourteenth amendment, declared in reference to the fifth amendment the principle he viewed as fundamental:

> [T]he Constitution of the United States ... declared that "no person shall be deprived of life, liberty, or property without due process of law." By that great law of ours it is not inquired whether a man is "free" by the laws of England; it is only to be inquired *is he a man*, and therefore free by the law of that creative energy which breathed into his nostrils the breath of life, and he became a living soul, endowed with the rights of life and liberty ... Before that great law *the only question to be asked of a creature claiming its protection is this: Is he a man?* Every man is entitled to the protection of American law, because

> its divine spirit of equality declares that all men are created equal.

Cong. Globe, 40th Cong., 1st Sess. 542 (1867) (emphasis added).

Representative James S. Brown, similarly, denied the notion that the basis for the right to life required anything other than human life itself:

> [D]oes the term "person" carry with it anything further than a simple allusion to the existence of the individual? It certainly cannot be strained into any recognition of slavery, since the very recognition of personality excludes [an institution which] does not regard its victims as persons but as chattels.

Cong. Globe, 38th Cong., 1st Sess. 1753 (1864).

Indeed, examples are legion to demonstrate the basic assumption of the framers and their contemporaries that "in the eyes of the Constitution, every *human being* within its sphere ... from the President to the slave, is a *person*." Cong. Globe, 37th Cong., 2d Sess. 1449 (1862) (Sen. Sumner) (first emphasis added).[186]

[186] E.g., Cong. Globe, 39th Cong., 1st Sess. 77(1866)(Sen. Trumbull) ("any legislation of any public sentiment which deprives any human being in the land of those great rights of liberty will be in defiance of the constitution"); id. at 322-23 (Sen. Trumbull) ("great object of securing to every human being within the jurisdiction of the Republic equal rights before the law"); id. at 1159 (Rep. Windom) (rights to life, liberty, and pursuit of happiness are "rights of human nature," and the most basic "right

The lack of power of the government to exclude from the persons protected under the fourteenth amendment, was forcefully stated by Representative Joshua R. Giddings,

> Our fathers, recognizing God as the author of human life, proclaimed it a "self-evident" truth that every human being holds from the Creator an inalienable right to live ...
>
> ...If this right be denied, no other can be acknowledged. If there be exceptions to this central, this universal proposition, that *all* men, without respect to complexion or condition, hold from the Creator the right to live, who shall determine what portion of the community shall be slain? And who may perpetuate the murders?

Cong. Globe, 35th Cong., 1st Sess. App. 65-66 (1858) (emphasis in original).

3.

The unique nature of the right to live is that which is critical. It is more than a right, more than even what has become known as a "fundamental right." Many fundamental rights (such as the "rights" to vote, and to own property) are governmental grants limited to those who are capable of exercising them. These are the

of human nature [is] the right to exist"); id. at 1151 (Rep. Thayer) ("relief of human nature" secured in thirteenth amendment); 3 Cong. Rec. 1794 (1875) (Senator Alen G. Thurman) (may not deny equal protection to "any person" in the jurisdiction, "be he sane or be he insane, *be he old or be he young*, be he innocent or he criminal, be he learned or be he ignorant") (emphasis added).

kinds of rights which someone can be denied because they arise from government. The existence of an individual renders *Roe's* review of clauses such as the qualifications for president inappropriate. Those clauses deal with privileges or rights which government has the power to limit because the nature and power of the government itself created it. The nature of public office, the nature of legal ownership and the right to vote all vary from government to government around the world. Life is the universal constant of all peoples everywhere that is in no way derived from a political body. It is the same under all forms of government. No age or physical trait can limit its nature.

A human being exists when he or she is complete unto him or herself. That one is dependent upon adults is only a reason to extend protection, not a reason to deny it. Viability or birth are not transcendent concepts - they are conditional circumstances. Every single human being exists only under conditional circumstances.

C.

IF THE STATE POSSESSES A RIGHT TO PROTECT THE LIFE OF A CHILD BEFORE BIRTH, THE CHILD MUST POSSESS A RIGHT TO PROTECT ITS OWN LIFE.

The U.S. Supreme Court has held that a state has the right to protect the life of a child prior to birth, and the state's interest is

sufficient to justify prohibiting abortion after viability. *Roe v. Wade*, 410 U.S. 113, at 164, 165, 93 S.Ct. 705, at 732 (1973); *Planned Parenthood of S.E. Pa. v. Casey*, ___ U.S. ___, 112 S.Ct. 279 at 2804, Slip Op. at 4 (1992).

Once it is recognized, as a matter of fact and law, that the child is a human being from conception to birth, the presence of a recognized interest in the state to protect that individual implies a legal right of the individual to protect himself. That the state has a right to protect an individual but the being himself lacks a right is repugnant to the very nature of the right to protect life under federal and state law. [see discussion, above, under Point II(B)].

The true nature of the state's interest is its *parens patriae* jurisdiction. *Santosky v. Kraemer*, 455 U.S. 745, 766, 102 S.Ct. 1388, 1401 (1982). *Parens patriae* refers to the role of a state as guardian of a person under legal disability. *Snapp v. Puerto Rico*, 458 U.S. 590, at 600 (n.8), 102 S.Ct. 3260, 3265 (1982). It is in this role that the state has the power to act for the benefit of a child in "loco parentis." *Kraemer, supra*. *Kraemer* defined the state's interest in preserving and promoting the welfare of a child as part of its *parens patriae* jurisdiction. When a state asserts the interest of the child, even fundamental Constitutional rights of a

parent may be defeated. *Santosky v. Kraemer, supra*. But the *parens patriae* interest of a state cannot exist without a co-existing personal right of the individual being protected. C.f. *Snapp v. Puerto Rico*, 458 U.S. 592, 600, 102 S.Ct. 3260, 3265. See, also *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 486, 95 S.Ct. 1029, 1042 (1975) (drawing a distinction in how a state may protect an individual's exercise of his rights.)

It is clear, under *Snapp*, that in instances where an individual can be identified, a state does not possess the standing to prosecute an action to protect the interests of an individual, only the individual can do so because the state would only be a nominal party. 458 U.S. at 600, 601, 607, 102 S.Ct. at 3265, 3268, 3269. See *Pennsylvania v. New Jersey*, 426 U.S. 660, 96 S.Ct. 2333 (1976); *Oklahoma v. Atchison*, T.&S.F.R. Co., 220 U.S. 277 (1911). Because of the ability to identify the child in this suit, the state could not have standing to maintain it. Only the child's father would have such standing.

The State has the right to exercise its *parens patriae* power independent of the individual's right, but the state action must be taken on behalf of an unidentifiable group. This is the basis, although unexpressed, for the *Roe* court to find that the state has

an interest to protect the child (although only referred to as "potential" life in 1973)[187] and even prohibit abortion after viability. But this right or interest of the state cannot exist unexercised and, at the same time, the law refuse to recognize the right of the individual to protect himself. What could possibly constitute a greater violation of the spirit and purpose of government than a political entity, created to protect the great unalienable right to live, refusing to exercise its power to protect a human being on the one hand, and refusing to recognize the right of that individual to act to protect himself? There is no greater violation of the rights of man, except perhaps, the fact that the state of New Jersey has taken affirmative steps to specifically authorize, license and supervise the taking of the very life in question.

D.

DENYING CHILDREN THE RIGHT TO LIVE ON THE BASIS OF THEIR STATUS AS "UNBORN" IS IN VIOLATION OF THE EQUAL PROTECTION OF THE LAWS UNDER BOTH THE STATE AND FEDERAL CONSTITUTIONS.

1. INTRODUCTION

[187] See discussion below under Point III(C) at Pb. 105 to 108.

The acknowledgement that a child is a human being, as a matter of fact, and law, renders denial of the right to live to the child a violation of the equal protection of the laws under both the state and federal constitutions.[188] In *U.S.A. Chamber of Commerce v. State*, 889 N.J. 131 at 157, 158 (1982):

[188] This section of the brief deals only with the question of whether a child possesses a right to live in the first instance. The question of whether the unborn child's circumstance creates a sufficient difference to justify termination of the child's life is really a question of balancing the child's rights against those of the mother. Although it relates to equal protection this balancing question is treated under Point V below. See also, discussion on viability, at Pb. 81-18 to Pb. 85-6 above.

> "When (state action) regulates 'fundamental rights' or 'suspect classes' it will be subject to 'strict scrutiny' and the state will be required to demonstrate (1) that a compelling need justifies the legislation and (2) that no less restrictive alternative will accomplish that state objective. See *Graham v. Richardson*, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971). At the other end of the spectrum is the rational basis test. Under this standard of review, a court inquires whether there is a conceivable, legitimate state objective and second whether the classification selected is rationally related to that objective. Id. at 371-72, 91 S.Ct. at 1851-52, 29 L.Ed.2d. at 541; *Dandridge v. Williams, supra*, 397 U.S. at 486-87, 90 S.Ct. at 1162, 25 L.Ed.2d. at 502-503. In considering the second, the categories need not be formed with mathematical nicety and legislatures may attack a problem one step at a time. *Williamson v. Lee Optical, supra*, 340.

Under New Jersey law equal protection requirements are even stricter that those under the Federal Constitution. *Right to Choose v. Byrne*, 91 N.J. 287, 450 A.2d 925 (1982).

2. THE CLASSIFICATION DRAWN BY NEW JERSEY EXTENDING THE RIGHT TO LIVE TO SOME CHILDREN, BUT DENYING IT TO OTHERS MUST BE STRICTLY SCRUTINIZED AND REQUIRES A COMPELLING INTEREST FOR ITS JUSTIFICATION.

Classifications that are subject to equal protection scrutiny under the Fourteenth Amendment of the United States Constitution may rise under the case law or common law of the State as well as under its legislative enactments. *Jersey Shore*

Medical Center - Fitkin Hospital, et al. v. Estate of Baum, 84 N.J. 137, 143, 144, 145 (1980).

The New Jersey Supreme Court, in *Jersey Shore* has stated:

> The Fourteenth Amendment of the United States Constitution applies to state common law as well as statutory law. The applicability of the equal protection clause depends not on whether a state has exercised its power in any particular form, but whether it has, in fact, exercised that power. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265, 84 S.Ct. 710, 718, 11 L.Ed.2d. 686, 697 (1964). A state is obligated to provide equal protection of its laws not only in the acts of its legislature, but also in the decisions of its courts. Stated otherwise 'it has been recognized that the actions of state courts in enforcing a substantive common law rule formulated by those courts, may result in denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings, in such cases may have been in complete accord with the most rigorous conceptions of procedural due process.' *Shelly v. Kraemer*, 334 U.S. 117, 68 S.Ct. 836, 844, 92 L.Ed. 1161, 1182-1183 (1948) (footnote omitted) (further citations omitted). Accordingly, the discrimination against husbands which results from application of the New Jersey Common Law Doctrine of Necessaries may be challenged under the Equal Protection Clause of the Fourteenth Amendment. *Jersey Shore v. Estate of Baum*, 84 N.J. at 144, 145.

The classification created by New Jersey, denying as it does, a "fundamental right" (although, as an unalienable right it is more basic than a "fundamental" right) requires a showing of a compelling state interest to satisfy both the equal protection principles of the U.S. Constitution and that of the State of New

Jersey. *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969); *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533, 561-562 (1964); *Kraemer v. Union Free School District*, 395 U.S. 621, 626-628 (1969); *Dunn v. Blumstein*, 405 U.S. 330 (1972); Cf. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). *Right to Choose v. Byrne*, 91 N.J. 287, 450 A.2d 925 (1982); See, *D.Y.F.S. v. A.W.*, 103 N.J. 591 (1986).

However, the principles of equal protection which apply to even the fundamental rights that are by their nature granted by government (such as the right to vote and aspects of the right to privacy) require the greatest of scrutiny where the right to life itself is involved. This right, by its nature, derives from the existence of the individual, not from governmental grants.[189]

POINT III

THE SCOPE AND NATURE OF A MOTHER'S RIGHT: ALTHOUGH, TO BE JUST AND LASTING, THE CONSTITUTIONAL PRINCIPLES GOVERNING A WOMAN'S RIGHTS AND OBLIGATIONS CONCERNING ABORTION REQUIRE THE RECOGNITION THAT A WOMAN'S *GRISWOLD* RIGHTS INCLUDE VOLUNTARY AND FREE DECISIONS CONCERNING PROCREATION, A MOTHER'S RIGHT MUST ONLY REFLECT HER TRUE INTERESTS AND MUST ACCOUNT FOR THE FACT

[189] See discussion under Point II, Section B above.

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No. 92-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

J.M., INDIVIDUALLY,

Petitioner,

- against -

V.C., [redacted],

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI TO SUPREME COURT OF NEW JERSEY AND MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF

CONCERNED WOMEN FOR AMERICA; ABORTION'S AFTERMATH; AMERICAN RIGHTS COALITION, INC.; CATHOLIC WOMEN'S LEAGUE OF NEW ZEALAND INCORPORATED; FEMCARE; FEMINISTS FOR LIFE OF AMERICA; INSTITUTE FOR PREGNANCY LOSS; INTERNATIONAL BLACK WOMEN'S NETWORK; NATIONAL COUNCIL OF CATHOLIC WOMEN; NATIONAL OFFICE OF POST-ABORTION RECONCILIATION AND HEALING; OPEN ARMS; PREGNANCY COUNSELLING SERVICES INCORPORATED; PROFESSIONAL WOMEN'S NETWORK; VICTIMS OF ABORTION NEW ZEALAND INCORPORATED; VICTIM'S OF CHOICE; WOMEN AFFIRMING LIFE; WOMEN EXPLOITED BY ABORTION; WOMEN FOR FAITH AND FAMILY; WOMEN FOR LIFE; WOMEN FOR WOMEN; ACCION FAMILIAR; ALLIANCE FOR LIFE; AMERICAN CENTER FOR LAW AND JUSTICE; AMERICAN FAMILY ASSOCIATION, INC.; APOSTOLATUS UNITE; CENTRO DE INVESTIGACION Y DOCENCIA; CHRISTIAN ADVOCATES SERVING EVANGELISM; COALITIONS FOR AMERICA; DELAWARE LAWYERS FOR LIFE; DELAWARE RIGHT TO LIFE; FAMILY AND YOUTH CONCERN; FAMILY OF THE AMERICAS; FAMILY PROTECTION LOBBY; FREE SPEECH ADVOCATES; FACULTAD DE MEDICINA; HUMAN LIFE FOUNDATION OF NEW ZEALAND; HUMAN LIFE INTERNATIONAL; INSTITUTO DE CIENCIAS FAMILIARES; KNIGHTS OF THE SOUTHERN CROSS; MARCH FOR LIFE; MARCH FOR LIFE EDUCATION AND DEFENSE FUND; NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES; NEW ZEALAND SOCIETY FOR THE PROTECTION OF THE UNBORN CHILD INCORPORATED; PRO-LIFE ACTION LEAGUE; RIGHT TO LIFE LEAGUE OF SOUTHERN CALIFORNIA; ROCKLAND COUNTY CATHOLIC COALITION; SCOTTISH ASSOCIATION FOR NATURAL FAMILY PLANNING; SERVICE AND RESEARCH FOUNDATION OF ASIA ON FAMILY AND CULTURE; SOCIETY FOR THE PROTECTION OF UNBORN CHILDREN; SOCIETY OF ST. VINCENT DE PAUL IN NEW ZEALAND; AND WORLD ORGANIZATION FOR THE FAMILY AS AMICI CURIAE IN SUPPORT OF PETITION

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The amicus curiae, Concerned Women for America; Abortion's Aftermath; American Rights Coalition, Inc.; Catholic Women's League of New Zealand Incorporated; FemCARE; Feminists for Life of America; Institute for Pregnancy Lost; International Black Women's Network; National Council of Catholic Women; National Office of Post-Abortion Reconciliation and Healing; Open ARMS; Pregnancy Counselling Services Incorporated; Professional Women's Network; Victims of Abortion New Zealand Incorporated; Victims of Choice; Women Affirming Life; Women Exploited by Abortion; Women for Faith and Family; Women for Life; Women for Women; Accion Familiar; Alliance for Life; American Center for Law and Justice; American Family Association, Inc.; Apostolatus Unite; Centro de Investigacion Y Docencia; Christian Advocates Serving Evangelism; Coalitions for America; Delaware Lawyers for Life; Delaware Right to Life; Family and Youth Concern; Family of the Americas; Family Protection Lobby; Free Speech Advocates; Facultad de Medicina; Human Life Foundation of New Zealand; Human Life International; Instituto De Ciencias Familiares; Knights of the Southern Cross; March for Life; March for Life Education and Defense Fund; National Institute of Family and Life Advocates; New Zealand Society for the Protection of the Unborn Child Incorporated; Pro-Life Action League; Right to Life League of Southern California; Rockland County Catholic Coalition; Scottish Assocation for Natural Family Planning; Service and Research Foundation of Asia on Family and Culture; Society for the Protection of Unborn Children; Society of St. Vincent de Paul in New Zealand; and World Organization for the Family hereby move the court for leave to file an amici curiae brief in support of the petitioner, J.M. Counsel for petitioner consents to the filing of the brief, but Amici did not obtain consent of the respondent, V.C.'s attorney.

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In The

Supreme Court Of The United States

OCTOBER TERM, 1992

No. 92-

J.M., individually

Petitioner

v.

V.C., *et al.*,

Respondents

INTERESTS OF AMICI

CONCERNED WOMEN FOR AMERICA ["CWA"].

CWA is the largest, nonpartisan, politically active women's organization in the United States, representing approximately 600,000 persons, 80% of whom are women. CWA, which was founded in 1979, maintains offices in Washington, D.C.

CWA has more than 600 chapters located in all 50 states. It is an organization that is family oriented and is concerned with preserving an environment in the United States which is conducive to building strong families and raising healthy children. To achieve that end, CWA works to preserve, protect and promote the sanctity of human life among other family issues. CWA women are active on the local and national levels in building strong families and raising healthy children.

CWA believes abortion denigrates women in general and demeans the legitimate and essential role of women as mothers; it contributes to the overall denigration of the dignity of life and has a negative impact upon the human race generally and its self-worth in particular.

ABORTION'S AFTERMATH ["AA"].

AA was founded in 1989 to provide networking support for post-abortion women in New Jersey. This Edison-based organization has ties with over 50 post-abortion support organizations in New Jersey, which in turn have contact with about 5,000 women per year.

AMERICAN CENTER FOR LAW AND JUSTICE

The American Center for Law and Justice is a national public interest law firm, chartered to enter the legal arena on issues of a broad public interest. The American Center has members in all fifty States. Attorneys from every State of the Union have affiliated with the American Center, to assit in the restoration of pro-liberty, pro-life and pro-family values.

On behalf of its members, the American Center calls for an end to the systematic exploitation and victimization of women by the abortion industry, and an end to the holocaust of the destruction of our progeny.

AMERICAN RIGHTS COALITION, INC. ["ARC"].

ARC was incorporated in Tennessee in 1987. ARC assists women with the physical and emotional problems resulting from abortion by referring women to medical, emotional and legal providers for assistance, including bringing malpractice claims against those who injure them through abortions.

ARC receives between five and 100 telephone calls per day. It has compiled data on deaths from legal abortions as reported in newspapers and as uncovered in lawsuits, indicating the extent to which the Federal Center for Disease Control significantly understates the number of deaths attributable to abortions.

ARC's main office is located in Chattanooga, Tennessee.

CATHOLIC WOMEN'S LEAGUE OF NEW ZEALAND INCORPORATED ["CWLNZ"].

First established in 1931, CWLNZ became a national corporation in New Zealand in 1949. CWLNZ is based in each of the six dioceses of New Zealand. At this time, its central office is in Hamilton.

CWLNZ's objects are to unite Catholic women in New Zealand in Christian fellowship in order to enhance the growth of their spiritual, intellectual, family and social life, and to foster mission and charitable works and social action, and, in particular, to provide a means by which the voice of Catholic women in New Zealand may be heard in national and international affairs. CWLNZ

participates in the pastoral life of the church and maintains liaison with parish, diocesan and national organizations. CWLNZ maintains affiliation and cooperation with the World Union of Catholic Women's Organizations. It maintains affiliations with other organizations where and in whatever manner the National Conference agrees is necessary or desirable to further the objects and policy of the CWLNZ. Finally, CWLNZ encourages participation by its members in active roles in ecumenical and community life.

CWLNZ conducts monthly gatherings of Catholic women, performs community welfare action, church activities and mission work for the South Pacific, among other things. It is actively opposed to abortion and supports the protection and sanctity of human life from conception until natural death.

CWLNZ has about 5,000 members from throughout New Zealand.

CHRISTIAN ADVOCATES SERVING EVANGELISM

Christian Advocates Serving Evangelism is a legal defense organization dedicated to protecting, preserving and defending the right to proclaim the Gospel of Jesus Christ in public places.

Amicus is particularly concerned by a disturbing tendency to undermine both cherished First Amendment freedoms and the fundamental right to life in the name of a judge-created "right" to abortion.

COALITIONS FOR AMERICA

COA was incorpoated in 1977 and is headquarted in Washington, D.C.

COA is a grass-roots organizing and lobbying organization that coordinattes activities amongst about 100 organizations nationwide in areas related to social issues, defense and foreign policy, legal and judicial matters, political reform and economic issues. COA takes a pro-life position on the abortion issue.

COA's activities include conducting coalition meetings wherein activities of the many orgnizations with which COA works are coordinated and acitivities, incluidng lobbying efforts, are undertaken on their behalf. COA is not a membership organization and has no members per se.

FEMCARE.

FemCare was founded in 1985 to provide post-abortion support to women in the greater New York metropolitan area. FemCare is headquartered in the Bronx, New York.

In addition to counseling individual women, FemCare provides referrals to other counselors, psychologists and spiritual directors. FemCare also assists in arranging the training of professional post-abortion counselors and psychotherapists and offers resource materials in post-abortion recovery for reference and distribution.

As a result of its work, FemCare has insight into the psychological, physical, social and emotional harm that abortion causes women.

FEMINISTS FOR LIFE OF AMERICA ["FFLA"].

FFLA is a Wisconsin corporation which was formed in 1973 and which actively seeks to continue to promote and expand over a century of effort by feminists toward achieving the goal of a society in which women are empowered to make life-affirming decisions for themselves and their children.

Headquartered in Kansas City, Missouri, FFLA has a total membership of approximately 5,000 nationwide with 47 affiliated chapters throughout the continental United States.

FFLA actively opposes societal pressures, direct and indirect, which would compel, coerce or create pressure upon a woman to abort her child. FFLA has provided the service of gathering and disseminating information concerning abortion that would otherwise not be available to the general public. FFLA, therefore, represents a separate, distinct and unique viewpoint not otherwise represented by any other organization either pro-life or pro-abortion, and in such capacity, is specially situated to present information that would otherwise not be available on the abortion issue.

FFLA has concluded that abortion is actually exploitive of women for many reasons. It is an institution that was created to extend a "right" to a mother to kill her own child because it is easier for a male-dominated society to fabricate such a right than it is to address and correct the underlying problems that perpetuate the exploitive use of women in a society which fails to extend to

women the respect, dignity and commitment that they deserve. The presumption that the decision to take the life of her own child belongs only to a mother is a furtherance of the isolation, stigma and blame that is placed upon women in pregnancies out of wedlock. It perpetuates and worsens the biased view that the pregnancy is "her problem", and not that of the father. It is a grave insult and indignity to women to suggest that a woman's place in the professional world and the workplace is conditioned upon her willingness and ability to kill her own child.

The perspective of FFLA is unique in the context both of abortion and of women's rights.

FREE SPEECH ADVOCATES

Free Speech Advocates is a legal defense project that exists to secure the First Amendment rights to engage in religous witness, peaceful sidewalk counseing, and protest of or conscientious objection to the destructionof unborn human life. Fee Speech Advocates endeavors to assure a proper and competent defense, due process, and all constitutional rights to those who take a stand against abortion.

Free Speech Advocates believes that judicial restraint and fidelity to the Constitution are essential to the presevation of genuine constitutional rgihts. When activist courts announce novel "fundamental rights" in a unprincipled manner, established constitution rights suffer. This is so far a variety reasons: first, judicially created rights dilute the significance of those rights the prople have chosen to embody in the Constitution; second, judicially created righs may actually conflict with or limit existing rights; third, the illegitimate judicial creation of rights produces an atmosphere of reactive hostility to claims of constitutional rights, resulting in an unwillingness of courts to afford proper protection for genuine constitutional rights.

Thus, judicial invention of a "fundamental right to abortion" has led to the dilution of free speech and othe rrights, has directly impaired the right to life and the right of states to enact criminal and medical regulations, and has triggered an understandable backlash that threaens to impair judicial solicitude for legitimate constitutional claims.

Abortion is not a thread in the fabric of liberty or privacy rights. Rather, abortion is a malignant tumor on the body politic.

Free Speech Advocates strongly urges the Court to remove this cancerous growth before it further consumes the flesh and fiber of this nation.

INSTITUTE FOR PREGNANCY LOSS ["IFPL"].

IFPL was founded in 1990 as an independent non-profit corporation. It is an education, research and treatment center dedicated to the study of the impact of human pregnancy loss (miscarriage, stillbirth, induced abortion and adoption). IFPL is particularly interested in the examination and remediation of traumatic abortion and adoption experiences, both of which are volitional in nature.

IFPL has been active in promoting public policies that are based on objective, relevant and current information regarding informed consent, adolescent crisis pregnancies, parental and spousal consultation and abortion and adoption decision-making and outcomes. IFPL provides information to the public and health care professionals on the complex nature of stressful pregnancy loss in general, and the psychological health risks of abortion and adoption in particular. IFPL conducts workshops and offers numerous publications, primarily in the area of the psychological effects of abortion. IFPL also provides intensive treatment for women and men traumatized by pregnancy loss, particularly in the area of impacted grief from either an abortion and/or an adoption experience.

IFPL is currently conducting a major international research project on the comparative effects of pregnancy losses in different cultures.

INTERNATIONAL BLACK WOMEN'S NETWORK ["IBWN"].

IBWN was founded in 1990 and has a membership of approximately 1,000 in the United States.

IBWN is a Christ-centered organization founded to address the needs of black women, especially in parenting and job training. The network is specifically interested in strengthening the family life of the black family and, in this context, IBWN has a special interest in the issue of abortion and its negative impact upon the black family in America today.

LEGAL ACTION FOR WOMEN ["LAW"].

LAW was incorporated in Florida in 1988 to assist women who have been physically injured by abortion in making medical malpractice claims against clinics and doctors because of such injuries.

LAW refers women for legal assistance and assembles a data base of the country's most notorious abortionists. LAW operates in all 50 states. It operates two telephone toll-free hotlines for women physically injured by abortion and receives 20 to 25 phone calls per day.

NATIONAL COUNCIL OF CATHOLIC WOMEN ["NCCW"].

NCCW is headquartered in Washington, D.C. It was established in 1920 and federates 8,000 Catholic women's organizations in the United States, which includes national organizations such as Catholic Daughters of the Americas (150,000 members), Daughter of Isabella (100,000 members) and Ladies of Charity (35,000 members). In addition, there are 123 diocesan councils who are members of NCCW as well as 6,690 parish organizations.

In total, NCCW represents between 800,000 and 1,000,000 women nationwide.

NCCW's primary function is to act through affiliated organizations to educate and empower Catholic women in the areas of spirituality, leadership and service. NCCW programs address issues of concern in areas related to church, family, community and legislation. Questions surrounding abortion and the taking of the life of a child without justification, are issues with which NCCW has dealt for many years. NCCW is familiar with facts and information related to abortion. NCCW has acted as advocate on behalf of women and children in state and national legislatures and provides support to women in various circumstances in their lives.

NATIONAL OFFICE OF POST-ABORTION RECONCILIATION AND HEALING ["NOPARH"].

NOPARH is a Wisconsin corporation, headquartered in Milwaukee, and was organized in 1990. The purpose of NOPARH

is to organize, educate and execute the international conference, "Healing Visions", which it co-sponsors with Marquette University. NOPARH also consults on the formation of church-based post-abortion healing ministries, including "Project Rachel" which is a post-abortion reconciliation service within the Catholic Church.

NOPARH operates a national post-abortion referral line and publishes an international post-abortion support services directory and provides research and resources on matters of post-abortion aftermath and healing. NOPARH provides networking and acts as a clearing house for clergy and therapists. NOPARH does not have a membership per se, but does have more than 200 regular financial
contributors. Supporters of the group are from across the United States and from all walks and denominations.

OPEN ARMS ["OA"].

OA is an international Christian ministry that was incorporated in the State of Washington in 1986. Its national office is located in Columbia, Missouri and OA has chapters throughout the United States as well as in other countries.

OA is dedicated to bringing hope and healing to anyone suffering from abortion's emotional and spiritual aftermath. OA is primarily made up of people who have personally experienced the tragedy of abortion and who have felt its devastating after-effects.

OA representatives carry out their ministry in several ways. They provide one-on-one confidential counseling through telephone hotlines and through contacts made while speaking or working with other pro-life sources. They sponsor monthly support groups during which participants may share their own personal abortion experiences in a non-threatening atmosphere. OA representatives also conduct a Bible study program specifically geared toward aiding those suffering from an abortion to achieve forgiveness and healing. OA has trained hundreds of individuals for post-abortion counseling and has done substantial research on the various harms caused women by abortion. Finally, OA's representatives engage in public speaking to share the message of hope to those hurting from abortion as well as to educate the church and the public concerning the negative effects of abortion on individuals and society.

PREGNANCY COUNSELLING SERVICES INCORPORATED ["PCSI"].

PCSI is a charitable trust incorporated under the laws of New Zealand. Its principal office is located in Auckland, New Zealand and it has 24 branches throughout the country.

PCSI is involved in counseling women distressed by pregnancy and those suffering from post-abortion stress. Post-abortion stress stems from the guilt and grief associated with the knowledge that the woman has killed a child. PCSI reports that clients frequently report they were deceived at the time of the abortion into thinking that they were not dealing with another human life.

PCSI counsels some 5,000 women annually and of this number, approximately 85% are initially seeking abortions and 15% are suffering from post-abortion stress.

PCSI counsels women that abortion involves the taking of a human life with the result that approximately two-thirds of those initially seeking abortion decide to continue their pregnancies.

PROFESSIONAL WOMEN'S NETWORK ["PWN"].

PWN represents women from a variety of professional and business fields who recognize the sanctity of all human life. PWN members are lawyers, accountants, consultants, teachers, realtors, professors and systems analysts. It has a membership of between 4,000 and 4,500 which is active in pro-life activities.

PWN is considered to be the voice of pro-life professional women and it conducts talks, primarily before college level assemblies, and also on television. PWN conducts a memorial service for those women who have died as the result of abortion.

VICTIMS OF ABORTION NEW ZEALAND INCORPORATED ["VOA"].

VOA was founded in 1989 and incorporated in New Zealand in 1991.

VOA is headquartered in Wellington, New Zealand and has nine branches each of which are staffed by a coordinator and counselors.

VOA is a post-abortion counseling organization for victims of abortion, including women, men, and children of women who

have had abortions. VOA's principal activities are counselling as well as providing information and submissions to Parliament and other groups. Those persons served by VOA have all suffered from the trauma of abortion.

VICTIMS OF CHOICE ["VOC"].

VOC was incorporated about 10 years ago in California. Its offices remain in Vacaville, California.

VOC seeks to provide education, information and counseling to women, primarily those suffering from post-abortion syndrome. VOC's Executive Director travels throughout the United States to train counselors who then counsel women and educate the public on issues arising out of post-abortion syndrome. VOC publishes a manual and produces articles and pamphlets for a readership of between 2 and 3,000. VOC's public education programs include workshops, conferences and seminars conducted throughout the world.

VOC also provides speakers who speak on the subjects of chastity, crisis pregnancy, fetal development, types of abortions, post-abortion syndrome and abortion recovery. VOC specializes in producing post-abortion materials and the training of counselors to assist women who have been harmed by abortion and VOC counsels those suffering the loss of an aborted family member. VOC is also aware of the harm caused to others beside the mother and her aborted child, especially siblings of aborted babies.

VOC provides services to approximately 20 new clients per month in each of its over 100 centers. Currently, VOC is expanding at the rate of approximately two new centers per month.

WOMEN AFFIRMING LIFE ["WAL"].

WAL was founded in 1990 and has its principal office in Boston, Massachusetts. Its membership of between 700 and 1,000 is drawn from 42 states.

WAL's purpose is to voice the commitment of Catholic women in support of women and the dignity of life and motherhood. WAL's purpose is to serve as a national organization of Catholic women committed to upholding the sanctity of each human life from conception to natural death.

WAL seeks to offer a public witness by women in defense of the unborn and unwanted through personal commitment, educational efforts, prayer and home and professional life.

WAL embodies a pro-life women's perspective on the issue of abortion.

WOMEN EXPLOITED BY ABORTION ["WEBA"].

WEBA was founded in 1982 in recognition of the fact that abortion carries with it serious emotional, psychological and physical consequences for women that were being ignored by society. During the 1980's it became apparent that many women felt they had been lied to about abortion and that abortion is not a safe or simple procedure and that pro-abortionists' public statements to that effect had operated to deceive women.

WEBA initially focused on providing support and counseling for women who have had abortions. By 1985, more than 30,000 women had contacted WEBA seeking help. Today, WEBA has chapters throughout the United States and in seven foreign countries. Each day WEBA's headquarters alone receives 50 to 100 telephone calls and numerous letters per day from women who are suffering because of abortion.

In addition to providing post-abortion counseling, WEBA also provides counseling to women in crisis pregnancy situations who may be considering abortion. WEBA provides information and educational materials concerning the true nature of abortion and also practical assistance and final alternatives to abortion. WEBA also works to educate the public about abortion and its damaging effects on women. From their own experiences, WEBA counselors and volunteers understand that the easy availability of abortion creates pressures on women which effectively negate other options in dealing with the problem pregnancy.

WOMEN FOR FAITH AND FAMILY ["WFF"].

WFF, which has its main office in St. Louis, Missouri, was incorporated in 1984. WFF is a Catholic women's organization which educates people on issues important to Catholics including those related to the family and is intended to aid women in their efforts to continually deepen their understanding of the Catholic

faith. WFF is an organization committed to pro-life principles from conception to natural death. WFF specifically rejects the notion that abortion, the deliberate killing of unborn children, is the "right" of any human being, male or female, or of any government.

WFF conducts conferences and produces publications wherein issues of Catholic faith and in support of family issues are enunciated. WFF draws its membership from the United States, United Kingdom, Canada, Australia and Holland. It has approximately 50,000 affiliated women in the U.S. and approximately 10,000 internationally.

WOMEN FOR LIFE (N.Z.), INC. ["WFL"].

WFL is a New Zealand corporation, having been formed in 1978. Its national office is located in Auckland, New Zealand.

WFL defends the rights of the unborn child from conception and supports the right to life of all persons until natural death. WFL supports and encourages women in their role as mothers, recognizing the major contributions made by them in their child-rearing and home-making roles. We believe a mother should have the right to be a full-time homemaker and a mother and that government should take steps to insure that mothers can economically exercise that right. We want to see the family once again actively supported and recognized as the cornerstone of society.

WFL lobbies the government on many issues, from daycare to homepay for mothers who choose to stay at home to care for their children. WFL submits material on pornography, the New Zealand Human Rights Amendment Bill, contraception, sterilization and the Abortion Amendment Bill. WFL presents the chastity-based program, "Learning to Say No, its Your Choice" into high schools, youth groups and parents groups. WFL speaks on abortion, homosexuality, daycare and condom failure. WFL is a Christian organization whose members believe in the sanctity of life, sound moral principles and family life.

WFL has a membership numbering 2,000, which is drawn from Auckland, Hamilton, Wellington, Taranaki, Te Awamutu, Northland, South Island and Palmerstown North in New Zealand.

WOMEN FOR WOMEN ["WFW"].

WFW is a corporation that was formed in Indiana in 1987 to protect and foster respect for the sanctity of human life from the moment of conception until natural death. WFW upholds the Virgin Mary as a role model for women. WFW recognizes the equality of men and women, while acknowledging their differences so as to promote the dignity and value of womanhood. In addition, WFW upholds and propagates the virtue of chastity and recognizes the true nature and essence of the sexual union and natural family planning.

WFW is an educational organization that produces a quarterly newsletter that addresses issues relating to feminism, church and family issues. WFW has a readership of more than 1,500 and although WFW members are primarily Roman Catholic, its membership derives from all denominations from 28 states, Canada, India and the Philippines.

ACCION FAMILIAR ["AF"].

AF is an unincorporated association that was formed in 1979 in Spain in order to help the family with all aspects of problems facing the family today, including, in areas related to legal and moral issues. Its main office is located in Madrid. AF believes that the family is the root of all health and sickness in society. AF promotes family values and supports the position that life cannot be taken by anyone from the moment of conception until natural death. AF believes in the stability of married couples.

AF disseminates information on family issues in national political campaigns, and has proposed an amendment to Spain's abortion law which served to forestall its effectiveness for one year. AF's members appear on television and radio programs, they lecture to school assemblies, and provide information to national senators and congressmen and to international congresses on matters relating to family values.

AF's membership is approximately 15,000 and is drawn from throughout the Spanish nation. Spanish citizens are generally reluctant to be publicly associated with organizations, and consequently AF's support in Spain is far broader than that signified by its membership numbers.

ALLIANCE FOR LIFE ["AFL"].

AFL was formed in Canada in 1972. The corporation's executive office is located in Winnipeg, Manitoba. Its purposes include educating Canadians on matters of human development, human experimentation, reproductive technologies, adoption, abortion, chastity, euthanasis and similar issues affecting human life. AFL provides counseling and referral services to the public with respect to unforeseen pregnancies and post-abortion trauma. AFL provides educational services and materials for its member groups to educate Canadians on human development, human experimentation, reproductive technologies, adoption, abortion, chastity, euthanasia and similar issues affecting human life. It has researched and published articles, pamphlets, and newsletters on issues surrounding the right to life, principally on abortion matters. It presents expert speakers on the issue of abortion, hosts conferences and presents briefs to government and policy-making organs. AFL has a 24 hour toll-free telephone line to counsel women facing inconvenient pregnancies and has produced a one hour television special on unplanned pregnancy and alternatives to abortion. AFL is a coordinating organization for 250 educational pro-life groups throughout Canada.

AMERICAN FAMILY ASSOCIATION, INC. ["AFA"].

AFA is a corporation organized in 1977 with offices in Tupelo, Mississippi. AFA purpose is to be a leader of citizen and church participation to promote traditional American values and to apply the biblical ethic in society.

AFA's local chapters are active in seeking to preserve the lives of unborn children and the physical and emotional health of their mothers.

AFA has approximately 600 local citizen chapters throughout the U.S. which are active in seeking to preserve community integrity through the implementation of public decency laws. It has a subscribers list of more than 885,000 individuals and churches for its monthly newsletter, AFA Journal.

APOSTOLATUS UNITE ["AU"].

AU was organized in 1986 and incorporated in Maryland in 1988. It has its offices in Woodstock, Virginia.

AU is a Catholic lay organization which has as its purpose to bring people to Jesus Christ to experience the Holy Eucharist through the Holy Mother of the Church, in union with the Holy Father.

AU organizes Rosary Congresses which consist of one to seven day prayer gatherings featuring Eucharistic adoration, Marian devotion and sound church teaching. AU conducts evangelization projects throughout the United States by bringing apostolates or organizations together who share the mission for the Holy Eucharist, Mary and the Church. One of AU's main prayer efforts is the World Prayer Movement which is ecumenical and global in nature. A Global Week of Prayer is conducted annually during the first week in October during which participants pray and fast to end abortion. The Global Week of Prayer is conducted in 88 countries and has over 11 million participants.

CENTRO DE INVESTIGACION Y DOCENCIA

Dedicated to the promotion of Natural Family Planning and Defense of human life.

COALITIONS FOR AMERICA ["COA"].

COA was incorporated in 1977 and is headquartered in Washington, D.C.

COA is a grass-roots organizing and lobbying organization that coordinates activities amongst about 100 organizations nationwide in areas related to social issues, defense and foreign policy, legal and judicial matters, political reform and economic issues. COA takes a pro-life position on the abortion issue.

COA's activities include conducting coalition meetings wherein activities of the many organizations with which COA works are coordinated and activities, including lobbying efforts, are undertaken on their behalf. COA is not a membership organization and has no members per se.

DELAWARE LAWYERS FOR LIFE ["DLL"].

DLL is an unincorporated non-denominational association of Delaware lawyers which was formed approximately one year ago.

DLL has a membership of more than 30 Delaware lawyers. The organization is involved in the representation and counseling of primarily single women who are clients of Birthright crisis pregnancy centers. DLL counsels its clients on the legal aspects of single parenthood, custody and visitation. In addition, DLL defends people on First Amendment grounds who are arrested for demonstrating in opposition to abortion.

DLL's members respect and defend the sanctity of human life from the moment of conception.

DELAWARE RIGHT TO LIFE ["DRL"].

DRL is a Delaware corporation with headquarters in Newark, Delaware. The corporation was formed in 1973 in order to educate people regarding issues of life, abortion and euthanasia. DRL supports respect for human life from fertilization until natural death.

DRL's activities include giving speeches, manning display boothes in community presentations, and sponsoring a "life chain" twice per year. DRL sponsors speakers and transportation for the "March for Life." DRL has approximately 1,250 dues paying members, with about twice that number on its newsletter mailing list.

FACULTAD DE MEDICINA

Dedicated to the promotion of Natural Family Planning and defense of human life.

FAMILY AND YOUTH CONCERN ["FYC"].

FYC was established in 1971 in the United Kingdom and currently has a membership of approximately 25,000 people. FYC is headquartered in Milton Keynes, England and has three branches in the United Kingdom.

FYC is concerned with, and has acted as a focus for, the welfare of the family and the issue of abortion which is necessarily an important part of the overall concern for the family. The issues of Aids, abortion, child abuse, divorce, illegitimacy, obscenity, parental responsibility and pedophilia are all of concern to FYC as manifestations of the underlying social dislocation that has been

called the breakdown of the family ecology. FYC's sponsors include many prominent persons from the medical profession, including the former gynecologist to Her Majesty, the Queen.

Among FYC's activities, are the production and promotion of educational booklets and videos intended to enhance the value of the traditional family and the value of human life.

FAMILY OF THE AMERICAS ["FOA"].

FOA was incorporated in 1977 in Missouri. This organization, whose office is in Dunkirk, Maryland, provides educational services to women and families on matters of natural family planning and teaches parents to enable them to remain the primary educators of their children regarding human sexuality.

FOA provides materials and offers training sessions to educate teachers from all over the world in matters of natural family planning. FOA's educational materials have been translated into more than 22 languages.

Although FOA does not have a membership per se, those who work in its programs are drawn from throughout the world.

FAMILY PROTECTION LOBBY ["FPL"].

FPL is an unincorporated association which was formed in Maryland in 1980. The purpose of FPL is to lobby the state legislature on behalf of evangelical churches in Maryland and to represent its membership on Judaeo-Christian issues, including in support of the position that human life begins at conception. FPL provides educational information to its 3,000 active members and to those on its mailing list.

FPL's membership is drawn from a broad spectrum of evangelical and other protestant churches, as well as some Catholic churches.

FREE SPEECH ADVOCATES ["FSA"].

FSA is a legal defense project with an office in Washington, D.C., that exists to secure the First Amendment right to engage in religious witness, peaceful sidewalk counseling, and protest of, or conscientious objection to, the destruction of unborn human life. FSA endeavors to assure a proper and competent defense, due

process and all constitutional rights to those who take a stand against abortion.

FSA and its legal counsel have specialized in litigation in both state and federal courts with regard to various First Amendment issues.

HUMAN LIFE FOUNDATION OF NEW ZEALAND ["HLF"]. (NEW DESCRIPTION)

HLF was formed in Auckland, New Zealand in 1984 and incorporated in 1985 under the Charitable Trusts Act of 1957.

HLF's objects are to promote the saving and protection of human life throughout its whole course from the moment of conception until natural death, with a view to the moral, ethical and mental advancement of the public in order to educate the public as to the need for respecting human life at every stage of its development. Additionally, HLF strives to educate the public to the sacredness and the dignity of natural procreation of human life and of marriage and family life. It endeavors to educate the public on all aspects of human life, its natural procreation (including natural family planning), its development and its natural death. HLF strives to conduct or encourage research into all aspects of human life, its natural procreation (including natural family planning), its development and its natural death, and to disseminate the results of such research. It assists graduate or undergraduate students or others to pursue studies or research at any level in accord with the stated objectives, including the provision of scholarships, bursaries, grants and/or payments of expenses.

In furtherance of its goals, HLF disseminates information and
submissions on issues concerning respect for life and the activities associated with the establishment of life.

HUMAN LIFE INTERNATIONAL

Human Life International, the world's largest pro-life organization, was founded in 1981 by Father Paul Marx, O.S.B., Ph.D. Its mission: bring the pro-life/pro-family messange to countries throughout the world. HLI

INSTITUTO DE CIENCIAS FAMILIARES ["ICF"].

ICF was organized in 1952 and subsequently incorporated in 1985 in Uruguay. ICF's sole purpose is to foster natural family planning. In fulfilling its purpose, it operates doctors' consulting rooms and trains instructors in natural family planning. ICF conducts courses in sexual education and family counseling. It publishes the Family Digest and gives talks on television and radio. ICF conducts its own four year university course in the education of Family Social Workers.

ICF, which has 19 members in its corporation and an additional 50 persons who are employed or who volunteer their services to the organization, operates in Uruguay, Argentina, Paraguay and Brazil.

KNIGHTS OF THE SOUTHERN CROSS ["KOSC"].

KOSC is an unincorporated association formed in 1923 in Auckland, New Zealand and now headquartered in Wellington. It is an association of Catholic laymen active in the lay apostolate and having over 500 members in 16 branches throughout New Zealand.

KOSC is currently engaged in pro-life issues, speaking out against the increasing number of abortions in New Zealand and opposing the pro-euthanasia lobby. KOSC is represented on New Zealand bio-ethics committees. KOSC has been effective in marshalling the public in support of Catholic causes.

Membership in KOSC is broadly based and includes lawyers, doctors and other professional men.

MARCH FOR LIFE ["MFL"].

MFL was incorporated in Washington, D.C. in 1974. The purpose of MFL is to insure the constitutional protection of the right to life of each human being from fertilization. MFL lobbies Congress and testifies on pro-life issues. MFL's Board of Directors has liaison with pro-life groups throughout the United States.

MARCH FOR LIFE EDUCATION AND DEFENSE FUND ["MLEDF"].

This corporation was formed approximately 13 years ago in Washington, D.C. Endeavoring to protect the right to life of each human being in existence from the moment of fertilization and to provide care for the pregnant mother and her pre-born child, MLEDF provides educational materials and conducts seminars student contests and an annual convention and seminars on pro-life issues. MLEDF sponsors the annual March for Life. MLEDF's membership, which is comprised of those who contribute time and/or money, is drawn from across the United States.

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES ["NIFLA"].

NIFLA was recently incorporated in April 1993. It is headquartered in Manassas, Virginia.

NIFLA is not a membership organization. It advises, counsels and gives legal assistance in matters of public interest law, particularly to pro-life crisis pregnancy centers throughout the United States, of which there are approximately 3,000.

NIFLA trains and provides legal assistance to pro-life crisis pregnancy centers to enable them to support women in crisis pregnancies so that they might carry their babies to term. In addition, NIFLA educates the public at large, through speakers and publications, on the issue of abortion and the need to provide compassionate, caring alternatives to abortion.

NEW ZEALAND SOCIETY FOR THE PROTECTION OF THE UNBORN CHILD INCORPORATED ["NZS"].

Incorporated in New Zealand in 1970, NZS has its national office in Wellington.

NZS has more than 28,000 active financial supporters from throughout the country, which is divided into 70 branches.

The objects of NZS are to uphold and promote the intrinsic value of human life and to uphold and protect the rights of unborn children from the time of conception. NZS seeks to uphold and protect the rights of unborn children and it encourages and promotes the study and research, collection and dissemination of the information on the moral, medical, legal, political and social implications of pregnancy and questions associated therewith. NZS informs and educates the public on the need for legal and

other safeguards for protecting and preserving the rights of unborn children. This organization assists and promotes the well-being of mothers and children, both before and after childbirth and, in particular, those who face adverse circumstances. NZS encourages the formation of local constituent societies and coordinates their activities on a national basis. NZS cooperates with government departments, other organizations and individuals engaged in fostering respect for human life, and in promoting social conditions which will provide the best opportunities for mothers and children. NZS subscribes to, and will work purposefully towards, the achievement of the realizable ideal of no abortions within society.

NZS develops systems to educate the public to influence the political process and to insure that adequate law is established and upheld. There is a common desire amongst NZS' membership to have all children protected both before and after birth. Its members come from all walks of life, all age groups, and from throughout New Zealand.

PRO-LIFE ACTION LEAGUE ["PLAL"].

PLAL was formed in 1980 when it was incorporated in Illinois, where it continues to have its main office.

PLAL is a pioneer in pro-life activism. The league uses every media opportunity to get the pro-life message out and to bring the focus of public attention back to the unborn child.

Although PLAL has no actual membership, it does have newsletter subscribers and supporters numbering between 8 and 10,000. PLAL's supporters are drawn from throughout the U.S., Canada, Australia, Ireland and Africa.

PLAL, in its activites, stresses the importance of sidewalk counseling at abortion clinics so as to offer women who are facing crisis pregnancies an alternative to abortion. PLAL contributes articles and letters to the media and has its representatives appear on television and radio programs in support of its positions. It has sponsored three conferences featuring former abortion providers and promoters who have given up the abortion business and are now actively pro-life.

RIGHT TO LIFE LEAGUE OF SOUTHERN CALIFORNIA ["RTLLSC"].

RTLLSC is a California corporation, having been incorporated in 1969. Its offices are located in Pasadena, California.

RTLLSC's purposes are twofold: to provide education and service. RTLLSC's education department handles several hundred speaking requests per year. The league holds an annual educational conference with nearly 500 people in attendance. Its Collegians for Life have clubs on 30 campuses throughout California. In addition, RTLLSC operates 13 Pregnancy Counseling Centers, three medical clinics and four education chapters.

RTLLSC has a membership of approximately 50,000 families drawn mainly from Southern California. In 1992 alone, RTLLSC counseled more than 20,000 women facing unplanned pregnancies.

ROCKLAND COUNTY CATHOLIC COALITION ["RCC"].

This unincorporated association was organized in Rockland County, New York in 1990. RCC is a grass-roots organization seeking to educate, inform and speak out on issues supporting Catholic teachings. RCC has approximately 750 members and a mailing list of 4,000.

RCC conducts meetings at which positions in support of Catholic teachings are taken. RCC members meet with representatives of school boards and publicizes its positions by communicating with the media and provides a speaking panel to various organizations. RCC takes a position in support of the belief that human life begins at conception and human life is entitled to protection and respect from that point in time until natural death.

SCOTTISH ASSOCIATION FOR NATURAL FAMLY PLANNING

Organized in 1979. Dedicated to teaching fertility awareness in schools, colleges and to groups of teachers, nurses, doctors, and seminarians which enables couples to responsibly plan their families. Teaches engaged and married couples about natural family planning.

SERVICE AND RESEARCH FOUNDATION OF ASIA ON FAMILY AND CULTURE

Dedicated to go beyond welfare measures for the well-being of women by promotiong natural family planning.

SOCIETY FOR THE PROTECTION OF UNBORN CHILDREN ["SPUC"].

SPUC is an unincorporated, non-profit English association which was established in 1966. Its national headquarters are in London, England.

SPUC was established to fight against the passage of the Termination of Pregnancy Bill in England, a bill to legalize abortion which was introduced into the House of Commons. SPUC was the first group of its kind in the world. Since its inception, SPUC's role has been two-fold: educational and political. As its title implies, its prime concern is to win legal protection for the unborn child from the moment of conception until birth and so most of its our work is concerned with spreading and extending knowledge of the humanity of the human person before birth and demonstrating that abortion represents the most fundamental abuse of human rights.

SPUC is regarded both inside and outside Parliament as the premier political body fighting against abortion and euthanasia and in performing educational and research work. SPUC has won worldwide recognition particularly with the production of a box-set of fetal models, "How You Began", with accompanying text, which was developed in consultation with experts in obstetrics and gynecology, pediatrics and embryology.

SPUC has 50,000 paying members and 300 local groups throughout the United Kingdom. In addition to its headquarters in London, SPUC has full-time offices in Glasgow, Belfast, Cardiff, Preston, Stockton, Barrow and South London.

SPUC's trained speakers fulfill thousands of speaking engagements each year throughout the country, addressing schools, universities and colleges. In addition, it produces millions of leaflets each year to the general public. SPUC has a number of specialist divisions, including a Handicap Division which comprises people with severe disabilities and their close relatives who campaign and are trained to speak out for the right to life of the disabled both before and after birth. In addition, SPUC has established a national organization called British Victims of Abortion through which women who have had abortions reach out

to others to provide counseling and healing following the abortion experience.

SOCIETY OF ST. VINCENT DE PAUL IN NEW ZEALAND ["SSV"].

Originally formed in France in 1833, SSV was incorporated in New Zealand in 1883.

SSV is an international charitable organization whose members practice Christianity by helping those in need on a person-to-person basis. Although Catholic in origin and character, SSV is open to all who wish to live their faith by loving their neighbors in the person of the needy and by helping people regardless of race, color or creed in all their temporal, personal and spiritual needs.

SSV has approximately 2,500 members (New Zealand's total population is only 3.5 million) drawn from throughout New Zealand. SSV has 25 central and district councils and 169 branches.

WORLD ORGANIZATION FOR THE FAMILY

Dedicated to helping parents to remain primary educators of their children. The organization is a strong defender of human life from the moment of conception and they promote the natural method of family planning.

SUMMARY OF ARGUMENT

This Court should grant certiorari in this case. The Court in *Roe v. Wade*, 410 U.S. 113 (1973) declined to decide the most important issues presented by J.M.'s petition: when does the life of the child begin and, if the child is a human being prior to birth, does the child have constitutional rights.

The question of when the child's life begins was intentionally left to future courts because of the *Roe* Court's

concern about the inadequacy of "man's knowledge" in 1973. This question is before this Court in the first instance and the only criteria for its disposition is the correctness of the court's determination, not principles of *stare decisis*, as though *Roe* had attempted to resolve the inquiry. It is the affirmative duty of this Court to resolve these questions now it is clear they can be resolved.

The legal significance of the fact that the child is a human being who experiences pain has never before been considered. No acceptance of *Roe* is possible until the Court does so.

Because the child is a human being prior to birth, none of the concerns of the Court, expressed in *Roe*, such reliance, and workability, are principles that preclude a decision in the J.M. case that would have a different result than *Roe*, recognizing the child has a right to live. Such a determination would demonstrate that Roe, in reality, was gravely at odds with principles that protect the most basic of human liberties: the welfare of children and their very existence.

Until these central issues are addressed, and the Court can state, with conviction, that all of the issues are correctly decided,

as if before the Court for the first time, it seems unlikely that *Roe* can ever be respected or accepted.

ARGUMENT

I. THE CENTRAL QUESTION PRESENTED IN THIS CASE HAS NEVER BEEN RESOLVED BY THIS COURT, AND IS THEREFORE BEFORE THIS COURT AS AN "ORIGINAL MATTER." THE REQUIREMENTS OF STARE DECISIS FOR OVERRULING ROE V. WADE ARE COMPLETELY SATISFIED BY THE FACTS OF THIS CASE. THE COURT SHOULD GRANT THE WRIT TO DECIDE THE CHILD'S RIGHTS.

As much as anything else, this Court's decision in Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. _, 112 S.Ct. 2791 (1992) reaffirmed the central holding in the twenty-year old case of *Roe v. Wade*, 410 u.s. 113 (1973) based upon principles of *stare decisis*.[1] The Joint Opinion of the Court explained:

> We do not need to say whether each of us, had we been Members of the Court when the valuation of the State interest came before it as an original matter, would have concluded, as the *Roe* court did, that its weight is insufficient to justify a ban on abortions prior to viability

[1] Two of the three authors previously expressed views that apparently challenged *Roe's* central holding; see, *Thornburgh v. A.C.O.G.*, 476 U.S. 747, 814, 828 (O'Connor, J., dissenting: "I do, however, remain of the views expressed in my dissent in *Akron*, 462 U.S. at 459-466. The state has compelling interests in ensuring the general health and protecting potential human life, and these interests exist 'throughout pregnancy'"). Justice Kennedy joined in the opinion of the Chief Justice in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), in which he stated: "We do not see why the state's interest in protecting potential human life should come into existence only at the point of viability."

> even when it is subject to certain exceptions. The matter is not before us in the first instance, and coming as it does after nearly twenty years of litigation in *Roe's* wake we are satisfied that the immediate question is not the soundness of *Roe's* resolution of the issue, but the precedental force that must be accorded to its holding. *Casey*, 112, S.Ct. at 2817.

The principles of *stare decisis* do not preclude a decision in the case of J.M. v. V.C. which is different from that reached in *Roe* for two separate reasons: [1] the central issue in this case [when does the life of the child begin? and, if the child is a human being prior to birth do those children have constitutional rights?] was not decided in *Roe* at all; and [2] even if the doctrine of *stare decisis* does apply, J.M. v. V.C. meets all of the requirements to overrule *Roe*.

A. THE QUESTION OF WHEN THE LIFE OF A CHILD BEGINS WAS NOT DECIDED BY *ROE* AND IT IS THEREFORE THE DUTY OF THIS COURT TO RESOLVE THE QUESTION. IT WAS THE PROMISE OF *ROE* THAT A SUBSEQUENT COURT WOULD DECIDE THIS ISSUE WHEN "MAN'S KNOWLEDGE" WAS SUFFICIENT.

Roe did not decide when the life of a child begins. The *Roe* Court specifically, and with deliberation, found that in 1973 it was unable to determine that question:

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy and theology are unable to arrive at any consensus, the judiciary, *at this point in the development of man's*

> *knowledge*, is not in a position to speculate as to the answer. 410 U.S. at 159 (emphasis added).

Roe specifically reserved this particular issue for later Courts by recognizing that "man's knowledge" grows and expands with new information and greater appreciation of the old. *Roe* recognized sufficiency of knowledge is a function of time and although "at this point in the development of man's knowledge" (1973) the Court could not reach a conclusion, the decision is reserved for future review.

Here, this issue is before this Court, "in the first instance," and the only criteria for its disposition is the correctness of the Court's determination. The Court is in no sense bound by Roe's inability to determine this issue, and *stare decisis* is not, in the strict sense, applicable to this issue in this case. C.f., *Baker v. Carr*, 369 U.S. 186, 236-237 (1962); *Penna.-Reading, S.S. Lines v. Bd. of Pub. Utility Commrs.*, 5 N.J. 114, 121-124 (if facts, which form the basis for a constitutional principle, differ in a subsequent case, the first is not even precedent as to the second). The legal significance of the fact that the child is a human being experiencing pain was never before considered.

Casey calls for the nation to accept *Roe's* central holding in an effort to finally resolve a divisive national debate. But *Roe* itself *never made a ruling upon the central issue before it*, reserving it for future Courts. There can never be an acceptance of *Roe* until this Court decides these central issues and is able to explain, with conviction, that its decision is legally correct. It would constitute a "breach of faith" with the people of this nation, as well as to the very constitutional principles on which it is built, if the court left unaddressed the issue on which the entire debate turns. By refusing to answer the question of when life begins, *Roe* made nothing short of a promise that this court would answer that question when it could. It must now do so, correctly and with conviction.

"At this point in the development of man's knowledge" it is clear that a child is a complete, separate human being from conception (and surely long before "viability") (see pet., p. 18-35) and this fact renders *Roe's* analysis on the question of the child's rights irrelevant (see, pet., p. 11 to 17). These matters are left for this court and no interpretation of *stare decisis* absolves the court of the duty to resolve them.

B. EVEN IF PRINCIPLES OF *STARE DECISIS* WERE APPLICABLE TO THIS CASE, BECAUSE OF NEW FACTS AND NEW APPRECIATION OF OLD ONES, *STARE DECISIS* DOES NOT

PRECLUDE THE COURT FINDING THAT THE CHILD HAS CONSTITUTIONAL RIGHTS PRIOR TO BIRTH.

Casey described four principles of *stare decisis* which it felt precluded overruling *Roe*: (1) there is no change of fact; (2) *Roe* is not inconsistent with other principles of constitutional law; (3) reliance; and (4) workability. *Casey*, 112 S.Ct. at 2808-2812. All of these are satisfied in this case, on the issue of the child's rights.

1. New Facts and New Appreciation of Old Ones.

William O. Douglas, a member of the majority in *Roe*, wrote of *stare decisis*:

> [a] search for a static security - in the law - is misguided. The fact is that security can only be achieved through constant change, through the wise discarding of old ideas...and *through the adopting of others to current facts*. It is easy...to overemphasize *stare decisis* as a principle in the lives of men. ...*The difficulty is to estimate what effect a slightly different shade of facts will have*. (emphasis added) Douglas, William O., *Stare Decisis*, 49 Colum. L. Rev. 735-743, 735-736 (1949).

The new information now available on when the life of a child begins, and the fact that the child experiences pain as early as eight weeks after conception (see Pet. p. 18 to 35) is of particular significance.

First, once it is appreciated that the child is a human being who experiences pain before birth, *Roe*, itself, to be upheld would have to completely ignore prior holdings of the Court, and other

authorities. (see, Pet. p. 11 to 17; p. 35 to 47; p. 58-59, n. 87). If *Roe* itself ignored prior precedent it would be difficult to conceive of a justification to extend any precedental value in the *Roe* decision. To do so would frustrate *stare decisis* because a maverick opinion could change law without regard to the doctrine, and then subsequent courts would be bound by *stare decisis* to follow an opinion which originally ignored *stare decisis* principles.

Second, new facts or new appreciation of old ones are often the basis to overrule prior precedent. *Casey* found that there were no new facts on the issues before them concerning the state power to intrude in personal decisions of a woman (*Casey*, 112 S.Ct. at 2811-2812). Yet, *Casey* cited Justice Brandeis' dissenting opinion in *Burnet v. Coronado Oil and Gas Co.*, 285 U.S. 393, 405-413 with approval, that in many instances when the Court applies the Due Process Clause, the issue before the Court is a mixed question of fact and law, and the nature of the factual inquiry should not be obscured merely because it is a court that makes the determination. 285 U.S. at 410-411. Whether the child is a human being who enjoys constitutional rights is precisely such a mixed question (see, Pet., p. 15 to 17).

When this Court, in *Mapp v. Ohio*, 367 U.S. 643 (1961), overruled *Wolf v. Colarado*, 338 U.S. 25(1949), decided only twelve years earlier, the court based its ruling on a new appreciation of facts which made the "Exclusionary Rule" necessary. *Mapp* is an example of a case which applied the Due Process Clause and involved a mixed question of fact and law. The facts suggested the need for a particular method of implementation of a recognized right. In the strictest sense, abortion is a method of implementing an underlying privacy right. In *Baker v. Carr, supra*, in which the court overruled *Colegrove v. Green*, 328 U.S. 547 (1946), and distinguished *Colegrove v. Barrett*, 330 U.S. 804, the Court reasoned that new facts required the result.

In J.M., two ultimate facts must now be taken into consideration: this is indeed a human being from conception, and these children experience pain (Pet. p. 18 to 35). Both of these facts constitute a new appreciation of old ones. They dictate new recognition of the interests of the child and father, give rise to the child's rights, and impact upon the application of the Due Process Rights involved. *Burnet, supra*, (Brandeis, J. dissenting), 285 U.S. at 405-413. In addition, our experiences since *Roe*, because of new advances in contraception and the disappearance of social

stigma, renders abortion as an unnecessary method of implementation of the privacy interest sought to be protected, as well as one which unjusting impacts the child. C.f. *Mapp v. Ohio, supra*.

2. Whether *Roe* is in Conflict with Prior Precedent at Odds with Personal Liberties Depends Upon Whether the Child is a Human Being.

The *Casey* majority argued that *Roe* is not in conflict with prior precedent and does not influence developments at odds with personal liberties. This statement is incorrect when the child's humanity must be acknowledged. (see, petition of J.M. at p. 58 to 50, including n. 87).

Casey's suggestion would have to ignore the reality that before birth the child is a human being who experiences pain. *Roe*, conflicts with all law which seeks to protect the best interests of children and is tragicly fatal to children who suffer during abortion, as well as detrimental to many children who survive it. Before *Roe*, the New Jersey Supreme Court held that the child was a separate person whose life began at conception and had constitutional rights before birth. *Smith v. Brennan*, 157 A.2d 497, 504-505 (1960); *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*, 422 N.J. 421, 201 A.2d 537 (1964). This interpretation of New

Jersey law was recently affirmed in *Hummel v. Reiss*, 608 A.2d 1341, 1345-1346 (1992). *Smith v. Brennan*, and *Raleigh Fitkin* reflected New Jersey's strong policy for protecting life over its destruction. *Smith*, 31 N.J. at 364; *Raleigh Fitkin*, 422 N.J. at 423, 424. This policy, prior to *Roe*, resulted in protection of children from the harm and pain of abortions. See N.J.S.A. 2A:87-1. (To perform an abortion was a high misdemeanor which brought a penalty of fifteen years of incarceration. See *New Jersey v. Novak*, 121 A.2d 5 21 (1956); *New Jersey v. Sicilano*, 117 A.2d 490 (1956)). In refusing to recognize a tort action for the so called "wrongful birth" claims the New Jersey Supreme Court eloquently explained the public policy of New Jersey against abortion:

> It is basic to the human condition to seek life and hold on to it however, heavily burdened. ...the right to life is inalienable in our society. ...we are not faced here with the necessity of balancing a mother's life against that of a child. The sanctity of a single human life is the decisive factor ...(that) it may have been easier for the mother and less expensive for the father to terminate the life of the child while he was an embryo, but these alleged determinants cannot stand against the preciousness of a single human life ... *Gleitman v. Cosgrove*, 227 A.2d 689 (1967).

Roe required New Jersey to abandon its policy of protecting the lives of children. In 1979, even when *Roe* compelled New Jersey

to recognize the wrongful birth cause of action, its Supreme Court noted:

> One of the most deeply held beliefs of our society is that life ... is more precious than nonlife (citation omitted) ... concrete manifestations of this belief are not difficult to discover. Documents which set forth principles upon which our society are founded are replete with references to the *sanctity of life*. The federal constitution characterizes *life as one of the three fundamental rights* of which no one can be deprived without due process of law ... our own constitution proclaims that the 'enjoyment and defending of life' is a natural rights. N.J. CONST. (1947), ART. I, SEC. I. The declaration of independence states that the primacy of man's 'unalienable' right to life is a 'self-evident truth'. Nowhere in these documents is there to be found an indication that the life of persons suffering from handicaps are to be less cherished than those non-handicapped human beings. *Berman v. Allan*, 80 N.J. 421, 429, 404 A.2d 8 (1979).

The harm created by *Roe* is quite evident when the Court recognizes that the unborn child is a human being. Law that was carefully developed to protect innocent lives was swept away because the Court has failed to acknowledge that these were persons in fact. For the children who are not aborted, *Roe* is often cruel. New Jersey now feels compelled to tell children that doctors who fail to inform their parents that the child may be born with a handicap, must pay large sums of money to their parents because their parents lost an opportunity to terminate their lives. (See *Berman v. Allan*, 80 N.J. 420 (1979); *Procanik v. Cillo*, 97 N.J.

339, 478 A.2d 755 (1984). That these children must live with this knowledge is harm fostered by *Roe*.

A father has no right to demand an abortion, nor should he. His embarrassment, hardship, or distress that flow from an unplanned pregnancy, whether he is prepared to rear or support the child, is irrelevant to whether society should extend him the "right" to take the child's life. However, where the right he seeks to enforce is one consistent with the child's best interest, the same statute that imposes obligations upon him based upon the single act of conception, extends to him the right to affirmatively choose to discharge his obligations through custody or visitation and support. Likewise, under the adoption statutes, a judgment of adoption cannot be entered against the natural father over his objection, unless there is a specific finding of abandonment or neglect. N.J.S.A. 9:3-46. The right of a natural father who is not married to the mother is based solely upon his status as genetic father. See *In re Adoption of a Child by J.R.D.*, 246 N.J. Super. 619 (Ch.Div.1990).

The issue can be framed in different ways. *Casey* may choose to frame the issue as a father blocking the mother's right to take the life of her own child. More to the point is that what V.C.

proposes is that the father's enjoyment of the benfits of his relationship with his child, his fundamental constitutional rights, can be entrusted to another who could arbitrarily destroy a relationship with his child for any reason.

Building on *Roe*, *Casey* found that although a father's constitutional rights and those of a mother are "equal" after birth the mother's can destroy those of a father before built. *Casey*, 112 S.Ct. at 2830. This may be the consequence of *Roe*, but it is drastically in conflict with precedent dealing with the equal protection of the laws. See *Craig v. Boren*, 429 U.S. 190 (1976); *Califano v. Goldfarb*, 430 U.S. 199, (1977); (gender based classifications require at least an interemediate level of scrutiny; strict scrutiny if there is a denial of a fundamental right[2]).

Under the New Jersey parentage act N.J.S.A. 9:17-40 et seq. the obligations of J.M. as father are derived from the fact of conception alone. The birth is the natural consequence of the conception.

If the fundamental constitutional right of the father is implicated, then the creation of a classification extending exclusive decision

[2] *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969); *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533, 561-562 (1964).

making power to the mother violates equal protection, because there would be no compelling interest of the State. *Shaprio, supra*; *Baker, supra*. If his constitutional rights are not fundamental, the classification created is gender based, requiring intermediate scrutiny. *Craig v. Boren*, 429 U.S. 190 397 (1976). As a result, the State classification must serve important governmental objectives and must be substantially related to the achievement of the objectives. The objective here is to protect the right of the mother to participate in making decisions about whether she should have children. See *Roe*, 410 U.S. at 153. That objective is already served. Once the mother conceives, she aleady has a child. The inconvenience of the mother in carrying the child, although real and substantial, can never outweigh the child's interest in life.

3. Given the Fact that the Child is a Human Being, the Principles of Reliance (and Workability) Has no Application.

Casey states the fact that some segments of our society have relied upon the court's prior holding in *Roe* requires affirmance, *Casey*, 112 S.Ct. at 2809, even if it cannot assert that it was correctly decided in the first instance. 112 S.Ct. at 2817.

By *Casey's* own calculation, the last case before this Court which required it to determine an issue of the magnitude of those

in the J.M. case, was *Brown v. Bd. of Ed. of Topeka*, 347 U.S., 483 (1954). *Casey*, 112 S.Ct. at 2814-2815. The irony of *Casey's* discussion of reliance is in the fact it was the very argument of those who sought in *Brown* to perpetuate racial segregation by affirmance of *Plessy v. Ferguson*, 163 U.S. 537 (1896). The reliance argument found in *Casey* is indistinguishable from the reliance argument of the four states seeking to preserve segregation in the consolidated cases that are universally known as *Brown v. Bd. of Ed.*[3]

Invoking the premise that longstanding principles which have been continually relied upon should be left unchanged, John W. Davis argued in *Briggs, supra*, that "somewhere, sometime to every principle comes a moment of repose when it has been so often announced, so confidently relied upon, so long continued, that it passes the limits of judicial discretion and disturbance." 49A

[3] The *Brown* case was actually a grouping of four segregation cases decided together. The accompanying cases were *Briggs v. Elliott*, *Davis v. County School Board of Prince Edward County, VA*, and *Gebhart v. Belton*. These cases concerned various statutes pertaining to school segregation in the respective states of Kansas, South Carolina, Virginia, and Delaware. Although it was decided separately, *Bolling v. Sharpe*, 347 U.S. 497 (1954) was also argued with *Brown*. The initial oral argument for these cases occurred before the United States Supreme Court on December 9-11, 1952, while the Court was presided over by Chief Justice Vinson. The cases were subsequently reargued, upon the request of the Court, on December 7-9, 1953, with Earl Warren having succeeded Mr. Vinson as Chief Justice.

Landmark Briefs at 490. Davis asserted that the South Carolina statute must stand because:

> [w]e *relied* on the facts that this Court had, not once but seven times, ... pronounced in favor of the "separate but equal" doctrine. We *relied* on the fact that the courts of last appeal in some sixteen or eighteen states have passed upon the validity of the "separate but equal" doctrine vis-a-vis the Fourteenth Amendment. We *relied* on the fact that Congress has continuously since 1862 segregated its schools in the District of Columbia. Id. (Emphasis added).

Indeed, it was the theme of all of the States that desegregation was contrary to longstanding customs and traditions which were "deeply ingrained", the disturbance of which would cause such dire consequence that on those grounds alone *Plessy* had to be affirmed. See, J. Lindsay Almond, id. at 383-384; 512-513; Kansas, id. at 752; Davis, id. at 490-491; T. Justin More, Id. a 407; 510-511; *Casey* observed:

> While we think *Plessy* was wrong the day it was decided, (citation omitted), we must also recognize that the *Plessy* court's explanation for its decision was so clearly at odds with the facts apparent to the court in 1954 that the decision to examine *Plessy* was on this ground alone not only justified but required. *Casey*, 112 S.Ct. at 2813.

This statement is pertinent in the J.M. case because, whether or not the *Roe* court believed that it could not determine when the life of a human being began, no one could, in light of the present evidence, dispute that the biological life of a complete, separate

and individual human being begins at conception. The court likens *Brown* to *Roe*, but *Roe* more resembles *Plessy* than it resembles *Brown*. The *Brown* case more resembles J.M. *Roe* simply does not possess the moral force of *Brown*. *Brown* corrected a wrong. *Roe* created one.

The Court should grant certiorari in this case with no fear that overruling *Roe* would be any more difficult to implement than *Brown* was, and no harder for the public to accept. When it is understood that these children are human beings, who experience pain and that the premise of this nation is that the life of every human being has value, and that each one of us is unique and irreplaceable, an acceptance of overturning *Roe* will follow, if overruling it is.

CONCLUSION

Because *Roe* did not determine the central issues presented by this case, and the principles of *stare decisis*, as applied to this case, do not otherwise preclude overruling *Roe*, the Court should grant a writ of certiorari in this case.

Calum B Anderson

CALUM B. ANDERSON, ESQ.

(5)

Supreme Court, U.S.
FILED
JUN 29 1993
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No. 92-1934

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

J.M., INDIVIDUALLY,

Petitioner,

—against—

V.C., et al.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

RESPONDENT'S OPPOSITION TO MOTIONS FOR LEAVE TO FILE *AMICI CURIAE* BRIEFS

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Respondent V.C. submits this opposition to the motions for leave to file three *amici curiae* briefs (one on behalf of Concerned Women for America, et al., one on behalf of World Federation of Doctors Who Respect Human Life, et al., and one on behalf of University Faculty for Life, et al.) in support of petitioner in the above-titled case. J.M. filed a petition for certiorari with this Court on June 8, 1993. Also on June 8, counsel for the first two sets of above named *amici curiae* filed motions for leave to file briefs in support of J.M.'s petition for certiorari. On approximately July 6, 1993, counsel for the third set of above named *amici curiae* filed a similar motion. Respondent has refused to consent to the filing of these *amicus* briefs and opposes the two motions for leave to file *amici curiae* briefs.

Respondent will argue in a separate motion for sanctions that the petition for certiorari filed by J.M. is frivolous. This Court has already denied certiorari twice in this matter and been burdened twice by J.M.'s previous petitions. The briefs of the *amici curiae* do not bring any relevant or useful matter to the attention of the Court but merely burden its staff and facilities. *See* Sup. Ct. R. 37.1. Accordingly, respondent urges the Court to deny the motions for leave to file the *amici curiae* briefs.

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RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Does petitioner have standing to raise claims on behalf of the fetus?

2. Are petitioner's constitutional rights under the Fourteenth Amendment implicated in the absence of state governmental action?

3. May a state court prohibit a woman from obtaining an abortion prior to fetal viability?

4. Does a man have a constitutional right to interfere with a woman's decision to have an abortion?

5. Is a fetus a "person" within the meaning of the Fourteenth Amendment?

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Miscellaneous:

Susan Goldberg, *Of Gametes and Guardians: The Impropriety of Appointing Guardians Ad Litem for Embryos in Vitro*, 66 Wash. L. Rev. 503 (1991) 2

Respondent, V.C., submits this brief in opposition to the petition for a writ of certiorari filed by petitioner, J.M. The petition seeks review of the judgment of the New Jersey Supreme Court which dismissed petitioner's appeal on the ground that the appeal did not present any substantial constitutional question and the issues raised were governed by this Court's decision in *Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992). *See Order, N.J. Sup. Ct., March 11, 1993*, App. Vol. I at A-221, 222.[1]

COUNTERSTATEMENT OF JURISDICTION

This Court does not possess jurisdiction to review the judgment of the New Jersey Supreme Court. First, petitioner lacks standing to assert the interests of the fetus, because a fetus is not a "person" with independent legal rights under the Constitution. Further, petitioner's assertion that this case implicates his own constitutional rights is frivolous, because the rights he asserts protect a person only against *governmental* action, and there is no governmental interference with petitioner's rights in this case. Consequently, no jurisdiction lies to hear the utterly meritless federal questions raised by the petition.

A. Petitioner Has No Standing To Raise Claims On Behalf Of The Fetus.

The law is clear that a fetus is not a person under the Fourteenth Amendment of the United States Constitution. *See infra* at 14-19. The conclusion necessarily follows that "an unborn child and persons acting in behalf of an unborn child may not assert the deprivation of any rights or privileges secured by the Amendment." *Poole v. Endsley*, 371 F. Supp.

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[1]All citations to materials in the appendix refer to Petitioner's Appendices submitted with the Petition for a Writ of Certiorari and are cited as "App. Vol. ___, at A-___."

1379, 1382-83 (N.D. Fla. 1974), *aff'd in part & remanded on other grounds*, 516 F.2d 898 (5th Cir. 1975). *See also Brady v. Doe*, 598 S.W.2d 388 (Tex. Civ. App. 1980), *cert. denied*, 449 U.S. 1081 (1981); *Rothenberger v. Doe*, 149 N.J. Super. 478, 374 A.2d 57, 58 (Ch. Div. 1977) (dismissing claim to enjoin woman's abortion brought by self described guardian *ad litem* on behalf of the fetus); *In re D.K.*, 204 N.J. Super. 205, 497 A.2d 1298, 1302-03 (Ch. Div. 1985) (reversing appointment of guardian for the fetus as "unconstitutional and void").

Courts have refused to recognize claims of purported guardians *ad litem* in abortion cases and denied standing to individuals seeking to intervene to challenge a woman's right to choose abortion. *See, e.g., Woe v. Bear*, No. H-79-1866 (S.D. Tex. May 5, 1980); *Margaret S. v. Edwards*, No. 78-2765 (E.D. La. Oct. 2, 1978); *Akron Center for Reproductive Health v. City of Akron*, No. C78-155A (N.D. Ohio May 16, 1978); *Zbaraz v. Quern*, No. 77-C-4522 (N.D. Ill. May 15, 1978) (subsequent history on merits omitted); *Ryan v. Klein*, 412 U.S. 924 (1973);[2] *Doe v. Bolton*, 319 F. Supp. 1048, 1057 (N.D. Ga. 1970) (three-judge court), *modified on other grounds*, 410 U.S. 179 (1973). *See also* Susan Goldberg, *Of Gametes and Guardians: The Impropriety of Appointing Guardians Ad Litem for Fetuses and Embryos*, 66 Wash. L. Rev. 503 (1991). Because the fetus is not a "person" under the Fourteenth Amendment, petitioner has no standing to raise any alleged constitutional rights of the fetus, and these claims are

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[2]In *Ryan*, intervenors purporting to represent embryos and fetuses appealed the ruling of a three-judge court holding unconstitutional New York's refusal to fund legal abortions. In a separate appeal by the State, this Court vacated the district court order and remanded the case for consideration in light of *Roe v. Wade*. *Commissioner of Social Servs. v. Klein*, 412 U.S. 925 (1973). On the intervenors' appeal, however, this Court summarily affirmed the district court, thus indicating its refusal to recognize claims of purported guardians *ad litem* in abortion cases.

not properly before this Court.

B. Petitioner's Constitutional Rights Under The Fourteenth Amendment Are Not Implicated Because There Is No State Action

The alleged federal questions raised by the petition concern petitioner's rights under the Fourteenth Amendment of the United States Constitution. *See* Cert. Pet. 2, 3. But the assertion that respondent's private abortion decision somehow implicates petitioner's constitutional rights is utterly frivolous. The federal constitutional rights cited by petitioner -- the right to procreate, the right to companionship with one's child and to discharge one's duties to one's child, and the right to equal protection of the laws -- protect a person only against *governmental* action. "Individual invasion of individual rights is not the subject-matter of the [Fourteenth] Amendment." *Civil Rights Cases*, 109 U.S. 3, 9-12 (1883); *see also Rendell-Baker v. Kohn*, 457 U.S. 830, 837 (1982). Every case petitioner cites as support for his constitutional claims involves governmental action affirmatively discriminating against or interfering with the autonomy of private individuals.[3] This, however, is not such a case.

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[3]*See Santosky v. Kramer*, 455 U.S. 745 (1982) (*state* may not sever parental rights absent clear and convincing evidence of unfitness); *Craig v. Boren*, 429 U.S. 190 (1976) (*state* may not discriminate on the basis of gender in the sale of alcoholic beverages); *Stanley v. Illinois*, 405 U.S. 645 (1972) (*state* may not sever parental rights based on unmarried status); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (*state and federal governments* may not deny welfare benefits to individuals who had resided in the administering jurisdictions for less than one year); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (*state* may not prohibit sale of contraceptives to married individuals); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (*state* may not sterilize persons convicted of crimes); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (*state* may not prohibit parents from sending their children to private schools).

For example, the Constitution certainly protects petitioner's right to be free from government intrusion into his decision to have a child. But it is up to petitioner, not lower court judges, to find a woman who will have a child with him. Rather than seeking protection against state interference with his constitutional rights, petitioner actually seeks to enlist the aid of the courts to seize control of V.C.'s body and compel her to bear his child. But the rights petitioner describes "involve[] a shield for the private citizen against governmental action, not a sword of governmental assistance to enable [the potential father] to overturn the private decisions of his fellow citizens." *Doe v. Doe*, 365 Mass. 556, 314 N.E.2d 128, 130 (1974). Petitioner improperly seeks to twist constitutional shields designed to protect individuals from government intrusion, into swords of government coercion to subordinate women.

Thus, because on their face the federal claims petitioner raises are entirely without merit, his mere allegation of a federal question does not establish jurisdiction in this Court. Where, as here, "such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this court as to leave no real room for controversy," no jurisdiction lies. *Equitable Life Ins. Soc'y v. Brown*, 187 U.S. 308, 311 (1902); *see also Zucht v. King*, 260 U.S. 174, 176 (1922).

COUNTERSTATEMENT OF THE CASE

Petitioner, J.M., filed a complaint alleging a relationship with respondent, V.C., which began in 1991. It is undisputed that the parties are not married. According to the complaint, in January 1992, V.C. became pregnant and decided to seek an abortion.

After retaining an attorney, on March 9, 1992, petitioner filed a complaint in the Superior Court of New Jersey,

Chancery Division. That same day, proceeding *ex parte* and without prior notice to V.C., petitioner applied for and was granted a temporary restraining order ("TRO") that, *inter alia*, enjoined V.C. from terminating her pregnancy and from leaving the State of New Jersey for the purpose of terminating her pregnancy. Petitioner asserted claims on his own behalf and sought to be appointed "guardian *ad litem*" for the fetus. Petitioner's requested relief, and the TRO that was entered, provided no exception should the continuation of V.C.'s pregnancy pose a threat to her life or health.

Respondent, V.C., moved on notice to dissolve the restraints and dismiss petitioner's complaint for failure to state a claim upon which relief could be granted. On March 19, 1992, after hearing argument from counsel, the trial court (1) dismissed petitioner's complaint to the extent it was brought by J.M., individually for lack of standing; (2) but declined to dismiss the complaint brought on behalf of the fetus; (3) appointed J.M. guardian *ad litem* to represent the interests of the fetus; and (4) continued the restraints imposed on V.C. The Court did not decide that the fetus had standing, nor that petitioner had shown a likelihood of success on the merits. Rather, the Court stated it *might* hold, after a plenary hearing, that the fetus is a "person" with rights protected under both the federal and New Jersey Constitutions.

On March 20, 1992, respondent moved on an emergent basis in the Appellate Division for leave to appeal from the trial court's order imposing the temporary restraints and declining to dismiss the complaint brought on behalf of the fetus. On March 23, 1992, petitioner moved for leave to cross-appeal from the dismissal of the complaint brought on behalf of himself individually.

On March 23, 1992, after hearing argument from counsel, the Appellate Division: (1) denied J.M.'s motion to cross-appeal the dismissal of this individual action; but also (2)

denied V.C.'s motion for leave to appeal the trial court's order her motion to dismiss the complaint in its entirety; and (3) granted V.C.'s motion for leave to appeal the trial count's order continuing the temporary restraints and summarily reversed and vacated the imposition of those restraints; but (4) stayed the dissolution of the restraints until 4:00 p.m. the next day, to give petitioner a chance to bring an application for emergent relief to the New Jersey Supreme Court.

Both sides sought leave to appeal to the Supreme Court of New Jersey on an emergent basis. Respondent moved to lift the stay, remove the restraints, and dismiss the complaint in its entirety. Petitioner sought to maintain the restraints, reverse the dismissal of his individual complaint, and have the entire matter remanded to the trial court for an evidentiary hearing on his contention that life begins at conception.

On March 24, 1992, determining that petitioner had "failed to demonstrate a reasonable likelihood of prevailing on the merits of his complaint," and concluding "that under current law, plaintiff's proffer of proofs would not realistically assist or inform the court in its determination of the legal issues properly before it," App. Vol. I, at A-177, 178, the New Jersey Supreme Court unanimously: (1) granted respondent's motion for leave to appeal the denial of her motion to dismiss the complaint brought by petitioner as guardian *ad litem* for the fetus, and dismissed the complaint; (2) granted respondent's motion to lift the stay of the Appellate Division's order dissolving the temporary restraints entered by the trial court, thereby dissolving the restraints; (3) denied petitioner's motion for leave to appeal the dissolution of the temporary restraints by the Appellate Division, dismissed as moot petitioner's motion for summary reversal, and denied petitioner's motion for a further stay; and (4) denied petitioner's motion for leave to appeal the dismissal of his individual complaint and dismissed as moot his motion for summary reversal on that issue.

On March 25, 1992 petitioner applied to Associate Justice David H. Souter for a stay of the New Jersey Supreme Court's decision. Justice Souter denied the stay. That same day petitioner reapplied to Associate Justice Clarence Thomas, who also denied the stay.

On March 31, 1992, petitioner moved in the New Jersey Supreme Court for reconsideration of the dismissal of his claim as guardian *ad litem* for the fetus, and moved in the Chancery Division for reconsideration of the dismissal of his claim as an individual. Petitioner's motion for reconsideration in the New Jersey Supreme Court was denied on April 6, 1992 and his motion for reconsideration in the trial court was denied on May 12, 1992. On May 18, 1992, petitioner filed a notice of appeal from the trial court order entered on March 19, 1992 dismissing his individual complaint.

On June 22, 1992, petitioner filed two separate but nearly identical petitions for certiorari with this Court, one allegedly on behalf of himself as an individual and one allegedly on behalf of the fetus, represented by petitioner as "guardian *ad litem*." Petitioner sought this Court's review of his claim as an individual -- the same claim raised herein -- even though that claim was still pending on appeal in the Appellate Division. In this Court, petitioner argued that the New Jersey Supreme Court's decision in this case was final as to both his claim as guardian *ad litem* for the fetus, and his claim as an individual. Simultaneously, petitioner argued in state court, that the New Jersey Supreme Court never reviewed petitioner's individual claim at all, so that he could continue to re-litigate these issues. This Court denied both petitions for writs of certiorari on October 5, 1992.

Respondent, V.C., filed a Motion for Summary Affirmance of the trial court's dismissal of petitioner's claim as an individual in the Appellate Division on July 31, 1992. On September 21, 1992 the Appellate Division granted

respondent's motion, dismissed petitioner's appeal, and ruled that "the determination presented for review [was] summarily affirmed." *N.J. Super. Ct. App. Div., Sept. 21, 1992*, App. Vol. I at A-185.

On November 4, 1992, petitioner filed a Notice of Appeal to the New Jersey Supreme Court. Respondent filed a Motion for Summary Affirmance or for Dismissal of the Appeal on December 21, 1992. On March 11, 1993 the New Jersey Supreme Court dismissed the appeal, holding the appeal failed to raise any substantial constitutional question and "is governed by current law. *Planned Parenthood v. Casey*." *Order N.J. Sup. Ct., March 11, 1993*, App. Vol. I at A-221, 222.

REASONS THE PETITION SHOULD BE DENIED

The petition should be denied because it fails to establish any of the factors that weigh in favor of review on a writ of certiorari: this Court's prior decisions are dispositive, the New Jersey Supreme Court properly applied those decisions, and no conflict exists among state or federal appellate courts as to the proper disposition of this case. *See* Sup. Ct. R. 10.1. As every appellate court has recognized, and as this Court reaffirmed in *Casey*, 112 S.Ct. at 2804, *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny clearly protect the right of every woman, including respondent, to choose to terminate her pregnancy prior to viability. These factors provided the basis for this Court's denial of petitioner's two prior petitions for writ of certiorari, and because petitioner here raises no new issues or questions that warrant review, certiorari should again be denied.

I. THIS COURT'S PRIOR DECISIONS ARE DISPOSITIVE AND WERE PROPERLY APPLIED BY THE NEW JERSEY SUPREME COURT.

A. Every Woman Has a Constitutional Right To Decide Whether Or Not To Terminate Her Pregnancy.

Petitioner argues that the New Jersey Supreme Court's decision to dismiss petitioner's appeal was in error because it was based on this Court's decision in *Roe v. Wade*, which, in petitioner's view, did not directly decide the question of when human life begins, and whether fetuses are entitled to constitutional protection. *See* Cert. Pet. at 10. The petition, in large part, consists of purported evidence[4] intended to prove that life begins at conception. However, because this Court has clearly held that the Constitution protects a woman's right to choose to terminate her pregnancy prior to viability, and that a fetus is not entitled to constitutional protection, the New Jersey Supreme Court's reliance on *Casey*, 112 S. Ct. 2791, is correct and this petition should be denied.

In 1973, this Court recognized that the Constitution guarantees every woman the right to determine whether or not to terminate her pregnancy prior to viability. *Roe*, 410 U.S. at 153. In *Casey*, this Court reaffirmed this right stating, "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed." *Casey*, 112 S.Ct. at 2804.

> The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v Wade*. It is a rule of law and a component of liberty we cannot renounce.

Casey, 112 S.Ct. at 2817.

Holding that "[t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the

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[4]This evidence was not presented below and is not part of the record.

liberty protected by the Fourteenth Amendment," *Casey*, 112 S.Ct. at 2807, this Court reiterated *Roe's* protection of a woman's right to choose abortion:

> An entire generation has come of age free to assume *Roe's* concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions; no erosion of principle going to liberty or personal autonomy has left *Roe's* central holding a doctrinal remnant . . . .[5]

Casey, 112 S.Ct. at 2812.

In *Casey*, this Court made clear that prior to viability, a State may not prevent a woman from obtaining an abortion. Although this Court recognized that "the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus," *id.* at 2804, before viability "the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure." *Id.*[6] Therefore, "[r]egardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the intimate decision to terminate her

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[5]If petitioner's claims are accepted, not only would women be deprived of the right to abortion, but many forms of contraception would be illegal as well, since such a finding would effectively reverse this Court's decision in *Griswold v. Connecticut*, 381 U.S. 479 (1965) (the decision to use contraception is a fundamental right).

[6]Even after viability, a State that chooses to regulate abortion must always provide exceptions to protect the woman's life *and* health. *Casey*, 112 S. Ct. at 2821, 2822. Thus, this Court continues to reject the argument advanced by petitioner that a state may only allow abortion where necessary to save the woman's life or "[w]here conception is not the result of voluntary conduct, in instances of rape and its equivalent." Cert. Pet. 63, n. 91; *see also* Cert. Pet. 62-63.

pregnancy before viability." *Id.* at 2821.

By seeking a court order absolutely prohibiting V.C. from having an abortion, petitioner would completely obliterate the constitutionally protected right to privacy recognized in *Roe* and reaffirmed in *Casey*. If a state can not ban abortions prior to viability, clearly a state court can not enjoin a woman from obtaining an abortion upon the application of an individual who disagrees with her choice.[7]

Nevertheless, petitioner argues that the woman's interest in terminating her pregnancy is outweighed by the fetus' right to life. Cert. Pet. 49-50.[8] However, because the fetus is not recognized as a "person" and because every woman is free to choose abortion prior to viability, petitioner's claims must fail. The New Jersey Supreme Court properly applied this Court's precedent in lifting the restraints imposed on V.C. and dismissing petitioner's appeal. Accordingly, the petition for a

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[7]The injunction petitioner sought below constituted state action even though the operative state actor was a court, not the legislature or executive. "A State acts by its legislature, its executive, or its judicial authorities. It can act in no other way." *Ex Parte Virginia*, 100 U.S. 339, 347 (1880), *quoted in, Shelley v. Kraemer*, 334 U.S. 1, 14 (1948). "The actions of state courts and judicial officers in their official capacity have long been held to be state action governed by the Fourteenth Amendment." *Palmore v. Sidoti*, 466 U.S. 429, 432 n.1 (1984). Lower Courts have consistently held that an injunction prohibiting a woman from having an abortion constitutes State action. *See, e.g., Rothenberger v. Doe*, 149 N.J. Super. 478, 374 A.2d 57, 59 (Ch. Div. 1977).

[8]Petitioner also asserts that New Jersey courts hold that life begins at conception, but each of the cases he cites as authority are either preempted by *Roe, see Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d (1967); *Smith v. Brennan*, 157 A.2d 497 (1960); *Kelly v. Gregory*, 125 N.Y.S. 2d 696 (1953), or misinterpreted *see Hummel v. Reiss*, 129 N.J. 118 (1992) (concerning claims of wrongful life). *See* Cert. Pet 36, 37.

writ of certiorari should be denied.[9]

B. A Man Does Not Have A Constitutional Right to Interfere With A Woman's Decision To Have An Abortion.

Petitioner contends that the New Jersey Supreme Court's decision somehow conflicts with the decisions of this Court that recognize rights of a father to procreation, parenting, companionship, and equal protection. *See* Cert. Pet. at 54-60. However, none of these asserted rights can possibly be

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[9]Because petitioner's requested relief in the courts below prohibited V.C. from leaving the State to obtain an abortion, the injunction also violated respondent's constitutional right to travel. *See Califano v. Aznavorian*, 439 U.S. 170, 176 (1978); *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1868). This Court recognized long ago that inherent in the nature of our federal union was the freedom to travel from state to state in search of a better life or to exercise a legal right. *Edwards v. California*, 314 U.S. 160 (1941). "The right to interstate travel is a right that the Constitution itself guarantees . . . [and] is a right secured against interference from any source whatever, whether governmental or private." *United States v. Guest*, 383 U.S. 745, 759-60 n. 17 (1966).

In 1973, this Court held that state imposed obstructions on a woman's right to travel to obtain an abortion were invalid. Concluding that the right to travel "must . . . protect persons who enter Georgia seeking the medical services that are available there," this Court invalidated Georgia's residency requirement for abortion as discriminatory towards those women traveling from out-of-state to obtain those services. *Doe v. Bolton*, 410 U.S. 179, 200 (1973). Two years later, this Court stated that Virginia could not "prevent its residents from traveling to New York to obtain those [abortion] services, or, as the State conceded . . . prosecute them for going there." *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975) (citations omitted).

In dissolving the temporary restraining order preventing V.C. from obtaining an abortion in New Jersey or from traveling outside of New Jersey to obtain an abortion, and in dismissing petitioner's appeal, the New Jersey Supreme Court properly applied this Court's decisions protecting the right to travel.

implicated in this case, because there is no governmental action that interferes with petitioner's interests. *See supra* at 3-4. Moreover, none of these rights gives a man authority to prevent a woman from obtaining an abortion. Even aside from the absence of State action necessary to trigger constitutional protection of petitioner's rights, the simple fact is that petitioner does not and can not cite any case that actually holds that a man, in any capacity, has any right to interfere with a woman's decision to have an abortion. In fact, the applicable precedent is directly to the contrary.

As this Court held in *Casey*, a State can not prohibit or unduly burden a woman's choice to have an abortion prior to fetal viability. 112 S.Ct. at 2804. Neither, can a state permit a third party to exercise a veto over the woman's decision. *Id.* at 2831. In striking down Pennsylvania's husband notification requirement, this Court in *Casey* held,

> The husband's interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife. The contrary view leads to consequences reminiscent of the common law. A husband has no enforceable right to require a wife to advise him before she exercises her personal choices . . . . A state may not give to a man the kind of dominion over his wife that parents exercise over their children.

Id. at 2831.

Distinguishing the very cases petitioner relies on here, *see* Cert. Pet. at 55 n. 85, this Court recognized that although "with respect to a living child . . . it would be reasonable to conclude as a general matter that the father's interest . . . and the mother's interest are equal . . . . [b]efore birth . . . the issue takes on a very different cast. It is an inescapable biological fact that state regulation with respect to the child a

woman is carrying will have a far greater impact on the mother's liberty than on the father's." *Casey*, 112 S.Ct. at 2830. For this reason, this Court held, the Constitution protects women from undue state interference with their abortion decision, "even when that interference is enacted into law for the benefit of their spouses." *Id.*

If a State can not compel a woman to notify her husband of her abortion decision, *a fortiori* a *non-spouse* can not be permitted to *veto* that choice. The injunction sought by petitioner therefore was an even more extreme invasion of the right of privacy than the statute struck down in *Casey*, and in lifting the injunction and dismissing petitioner's frivolous appeal, the New Jersey Supreme Court merely followed binding precedent.

C. A Fetus Is Not A "Person" Within The Meaning Of The Fourteenth Amendment.

Petitioner's entire argument is premised on the invalid assumption that a fetus is a child, and therefore a father has standing to protect the fetus' interests. Unless the Court accepts petitioner's claim that an embryo becomes a human being with full constitutional rights and protections upon the moment of fertilization, petitioner's whole argument fails. A large portion of the petition is devoted to alleged medical findings, most of which materials were never presented below. However, because the determination of legal "personhood" is governed by controlling precedent, this alleged medical evidence is irrelevant.

Petitioner also argues that overruling *Roe* is consistent with *stare decisis*, because new factual findings require reapplication of those facts to constitutional principles. However, petitioner has not presented any facts worthy of the reevaluation of longstanding precedent, much less the reversal of a long line of cases.

Finally, petitioner argues that the framers of the Constitution intended to include fetuses in the 14th Amendment's definition of "person," and therefore the New Jersey Supreme Court's decision is invalid. *See* Cert. Pet. 38-45. However, petitioner cites no legal authority supporting this absurd interpretation.

Roe v. Wade presented the first opportunity to decide whether a fetus is a "person" under the Fourteenth Amendment. After examining both the language of the Fourteenth Amendment and the relevant case law, this Court held that as a matter of law, a fetus is not recognized as a "person" and has no independent rights under the law. *See Roe*, 410 U.S. at 157-8. "[T]he unborn have never been recognized in the law as persons in the whole sense," this Court held, and "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." *Id.* at 158, 162. Since *Roe*, this Court has repeatedly refused to recognize independent fetal rights. *See Colautti v. Franklin*, 439 U.S. 379 (1979); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983). *Cf. International Union, U.A.W. v. Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991) (employer's "fetal protection" policy excluding women with child-bearing capacity from lead-exposed jobs violates Title VII). As Justice Stevens stated in *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), "[n]o member of this Court has ever suggested that a fetus is a 'person' within the meaning of the Fourteenth Amendment." *Id.* at 779 n.8 (Stevens, J., concurring). Most recently, in *Casey*, Justice Stevens reiterated:

> Thus, as a matter of federal constitutional law, a developing organism that is not yet a "person" does not have what is sometimes described as a "right to life." This has been and, by the Court's holding today, remains a fundamental premise of our constitutional law governing

reproductive autonomy.

Casey, 112 S.Ct. at 2839 (Stevens, J., concurring in part and dissenting in part).

Indeed, even Justice Scalia's opinion in *Casey* lends no support to petitioner's contention that a fetus is guaranteed constitutional rights. Justice Scalia argued that the "States may, if they wish, permit abortion-on-demand, but the Constitution does not *require* them to do so." *Id.* at 2873 (Scalia, J., concurring in part and dissenting in part) (emphasis in original). But if a fetus were recognized as a "person" with rights guaranteed under the Fourteenth Amendment, presumably States would be prohibited from allowing legalized abortion.

Petitioner argues that *Roe* should be overruled, but he submits no persuasive reason for doing so. Brushing aside concerns for *stare decisis*,[10] petitioner at first apparently admits that whether a fetus is a person is a "mixed question of fact and law." *See* Cert. Pet. 16. But petitioner can point to *no* development in the law that undermines *Roe*'s holding that a fetus is not a "person" under the Fourteenth Amendment.

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[10]Petitioner argues that *stare decisis* is "not a bar" to overruling *Roe* simply because this Court has overruled prior decisions before. Cert. Pet. 15. But in *Casey*, using a somewhat less simplistic analysis, this Court cogently observed:

> A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law.

Casey, at 2816.

Indeed, lower courts have consistently followed this holding,[11] and petitioner cites no contrary authority.[12]

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[11]*Ruiz Romero v. Gonzalez Caraballo*, 681 F. Supp. 123 (D.P.R. 1988) (infant may not maintain claim under 42 U.S.C. § 1983 for prenatal injuries); *Harman v. Daniels*, 525 F. Supp. 798 (W.D. Va. 1981) (fetus has no cause of action under 42 U.S.C. § 1983 or under the Constitution); *Civic Awareness of America, Ltd. v. Richardson*, 387 F. Supp. 1086 (E.D. Wis. 1975) (taxpayers lack standing to sue on behalf of fetuses), *aff'd.* 532 F.2d 756 (7th Cir.), *cert. denied*, 429 U.S. 829 (1976); *Poole v. Endsley*, 371 F. Supp. 1379 (N.D. Fla. 1974) (fetus not a child for purposes of Social Security Act and has no cause of action under Section 1983 or Fourteenth Amendment), *aff'd in part & remanded on other grounds*, 516 F.2d 898 (5th Cir. 1975).

[12]Conflating two separate issues, petitioner argues that the States's interest in potential life necessarily confers the status of legal personhood on the fetus. *See* Cert. Pet. 45-6. Once again, petitioner's confusing argument is presented with citations that, when examined, do not support his position. *Snapp v. Puerto Rico*, 458 U.S. 592 (1982), the primary case petitioner relies on, has absolutely nothing to do with abortion and, in any case, stands for exactly the *opposite* of what petitioner asserts. In *Snapp* this Court held that the common law approach to *parens patriae* standing that petitioner advocates here:

> has relatively little to do with the concept of *parens patriae* standing that has developed in American law. That concept does not involve the State stepping in to represent the interests of particular citizens who, for whatever reason, cannot represent themselves. In fact, if nothing more than this is involved -- i.e., if the state is only a nominal party without a real interest of its own -- then it will not have standing under the *parens patriae* doctrine.

Snapp, 458 U.S. at 600.

Indeed, the fact that a state may have a legitimate interest in something does not confer upon that thing standing to raise claims. For example, although a state may have an interest in protecting trees, the trees themselves -- which are not persons -- have no standing to come into court and no individual has standing to raise claims on behalf of

(continued...)

Petitioner argues that overruling *Roe* is consistent with *stare decisis* because whether a fetus is a "person" turns on when human life begins. Cert. Pet. 12-14. Petitioner then launches into a lengthy and often unintelligible discussion of alleged recent developments and discoveries in science and medicine. Apparently, this exposition is designed to demonstrate that life begins at conception, although petitioner's repeated focus on late term abortions suggests he is advancing a somewhat mere modest claim. *See, e.g.*, Cert. Pet. 31.[13]

In any case, petitioner's argument is fatally flawed in at least two respects. First, petitioner never explains why the legal question of whether a fetus is a "person" under the Fourteenth Amendment turns on whether life begins at conception. Second, petitioner's factual assertions, whatever they may be worth, go not to the issue of when life begins, in terms of what characteristics a fetus must possess to be deemed human, but rather to what characteristics a fetus possesses. The proffered evidence does not prove that life begins at conception, but merely begs the question. In other words, the fact that an eight-week old fetus has fingers is not probative, for example, unless we know that fingers are what define human life.

Petitioner's factual assertions cannot answer this "difficult question of when life begins" precisely because it is a metaphysical issue whose philosophical and theological components necessarily frustrate consensus.

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[12](...continued)
trees or to be appointed "guardian *ad litem*" to represent alleged interests of trees.

[13]Petitioner's reference to a subsequent pregnancy of respondent, *see* Petition for Writ of Certiorari at 5, 9, is wholly inappropriate and irrelevant as that pregnancy is not, in any way at issue in this litigation.

> When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

Roe, 410 U.S. at 159. In fact, there is no consensus in the scientific community that life begins at conception and such a conclusion, based as it is on philosophical and theological concerns, can not be drawn from the alleged medical evidence submitted by petitioner.

II. THE NEW JERSEY SUPREME COURT'S DECISION CONFORMS WITH THE DECISIONS OF EVERY APPELLATE COURT TO CONSIDER THE ISSUE.

A. No State Appellate Court Has Ever Held That A Man May Prevent A Woman From Obtaining An Abortion.

Since this Court's decision in *Roe v. Wade*, literally dozens of cases brought by husbands or putative boyfriends have sought to prevent women from exercising their right to choose abortion. To respondent's knowledge, every case has rejected the precise arguments petitioner makes here, and has held that a man does not have the right to a court order enjoining a woman from exercising her abortion right. This has been true in cases where the man seeking the court order was the woman's husband, *see Conn v. Conn*, 525 N.E.2d 612 (Ind. Ct. App.), *aff'd & opinion adopted*, 526 N.E.2d 958 (Ind.), *cert. denied*, 488 U.S. 955 (1988); *Coleman v. Coleman*, 57 Md. App. 755, 471 A.2d 1115, *cert. denied*, 298 Md. 353, 469 A.2d 1274 (1984); *Doe v. Doe*, 365 Mass. 556, 314 N.E.2d 128 (1974); *Meyers v. Lewis*, No. 111440 (Mich. App. Sept. 15, 1988), *appeal denied*, No. 841469 (Mich. Sept. 22, 1988), *cert. denied*, 488 U.S. 967 (1988); *Steinhoff v. Steinhoff*,

No. 10549/88 (N.Y. Sup. Ct. June 29, 1988); *Anderson v. Anderson*, No. 881320 (Minn. Dist. Ct. July 8, 1988); *Hayes v. Hayes*, No. 85-CI-04460 (Tex. Dist. Ct. Mar. 27, 1985), as well as where the man was not the woman's husband but claimed to be responsible for the woman's pregnancy, *see Doe v. Smith*, 527 N.E.2d 177 (Ind. 1988), *cert. denied*, 429 U.S. 919 (1989); *Doe v. Roe*, No. 88-1629 (N.Y. Sup. Ct. Sept. 14, 1988), *appeal dismissed as moot*, 552 N.Y.S.2d 75 (App. Div. 1990); *Rothenberger v. Doe*, 149 N.J. Super. 478, 374 A.2d 57 (Ch. Div. 1977); *Jones v. Smith*, 278 So.2d 339 (Fla. 1973), *cert. denied*, 415 U.S. 958 (1974); *Pagel v. Roe*, No. 83-765 (Wis. Ct. App. Apr. 21, 1983); *Yozie v. Munson*, No. 82/19 56 S (Conn. Super. Ct. Sept. 28, 1982). *See also Przybyla v. Przybyla*, 87 Wis. 2d 441, 275 N.W.2d 112 (Ct. App. 1978) (woman's exercise of right to terminate her pregnancy without consent of husband cannot support recovery by husband for intentional infliction of emotional distress).

Throughout this litigation, petitioner has cited not even one case in conflict with the New Jersey Supreme Court's decision below. This case and the foregoing authorities were correctly decided, and there is no reason to disturb this clear and unbroken line of precedent.

B. Every Federal Court To Address The Issue Has Held That Husband Notice Or Consent Requirements For Women Seeking Abortion Are Unconstitutional.

Just as State courts have consistently held that men do not have a right to court orders enjoining their wives or girlfriends from having abortions, since this Court's decision in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), invalidating Missouri's requirement of spousal consent for abortion, to respondent's knowledge every federal court to address the issue has struck down related statutory requirements of husband notice or consent for abortion, just as

this Court did in *Casey*, 112 S.Ct. 2791. *See, e.g., Charles v. Carey*, 627 F.2d 772 (7th Cir. 1980); *Eubanks v. Brown*, 604 F. Supp. 141, 148 (W.D. Ky. 1984); *Planned Parenthood v. Board of Medical Review*, 598 F. Supp. 625, 637 (D.R.I. 1984); *Scheinberg v. Smith*, 482 F.Supp. 529 (S.D. Fla. 1979), *aff'd in part, vacated in part, & remanded*, 629 F.2d 476 (5th Cir. Unit B Oct. 1981), *on remand*, 550 F. Supp. 1112 (S.D. Fla. 1982); *Doe v. Deschamps*, 461 F. Supp. 682, 686 (D. Mont. 1976); *Wolfe v. Schroering*, 541 F.2d 523 (6th Cir. 1976).

Plainly, the decision of the New Jersey Supreme Court was fully in accord with *Casey* and these other federal decisions. Once again, petitioner cites no contrary authority, nor provides any reason for departing from this consistent line of cases.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

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Supreme Court, U.S.
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No. 92-1934

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

J.M., INDIVIDUALLY,

Petitioner,

- against -

V.C., et al.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

RESPONDENT'S MOTION FOR SANCTIONS

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INTRODUCTORY STATEMENT

Respondent, V.C., hereby moves for sanctions pursuant to Supreme Court Rule 42.2 and 28 U.S.C. § 1927. Respondent seeks just damages and single or double costs in the amount of $600 (or $1,200)[1] as compensation for printing costs incurred in responding to petitioner's frivolous petition for a writ of certiorari and motions of *amici curiae* in support of the petition.

The petition filed herein is the third petition for a writ of certiorari petitioner, J.M., has filed in this action. Last year, on June 22, 1992, petitioner filed two nearly identical petitions, one allegedly on behalf of himself and one allegedly on behalf of the fetus. In the present, third petition, J.M. again raises these same claims. Although this petition is allegedly filed on behalf of J.M., individually, petitioner nevertheless presents all the same arguments pertaining to the fetus' right to life that he previously raised in the petition on behalf of the fetus. The present petition, like the prior two, is frivolous and should be denied. In addition, sanctions should be imposed to compensate respondent for her costs and to deter J.M. from filing yet another frivolous petition or other application at some time in the future.

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[1]Printing costs for Respondent's Brief in Opposition to the Petition for a Writ of Certiorari amounted to approximately $400; printing costs for Respondent's Opposition to Motions for Leave to File *Amici Curiae* briefs totalled approximately $200. Therefore, an award of single costs should total $600; an award of double costs should total $1200. Respondent does not seek reimbursement for attorneys' fees incurred in responding to petitioner's applications.

PROCEDURAL AND FACTUAL BACKGROUND

According to the complaint, petitioner and respondent were involved in a non-marital relationship which began in 1991, and in January 1992, respondent became pregnant. Upon learning that respondent had decided to have an abortion, on March 9, 1992, petitioner brought this action seeking an injunction preventing respondent from terminating her pregnancy. Moving *ex parte* and without prior notice to respondent, petitioner applied for a temporary restraining order ("TRO") to prevent respondent from having an abortion. The Superior Court of New Jersey, Chancery Division, entered a TRO enjoining respondent from terminating her pregnancy and from leaving New Jersey to obtain an abortion. The TRO provided no exception for respondent should the forced continuation of her pregnancy pose a threat to her life or health.

Respondent moved to dissolve the TRO and dismiss the complaint for failure to state a claim upon which relief could be granted. On March 19, 1992, the Chancery Division dismissed petitioner's claim as an individual for lack of standing. The Court declined to dismiss petitioner's claim brought on behalf of the fetus, however, and appointed petitioner as "guardian *ad litem*" for the fetus and continued the TRO against respondent.

On March 20, 1992, respondent moved on an emergent basis for leave to appeal to the New Jersey Appellate Division, seeking to lift the TRO and dismiss the remainder of petitioner's complaint brought on behalf of the fetus. On March 23, 1992, petitioner moved for leave to cross-appeal the dismissal of his complaint

brought as an individual. The Appellate Division granted respondent's motion for leave to appeal the order continuing the TRO, and summarily reversed and vacated the restraints. However, the Court stayed the dissolution of the TRO until 4:00 p.m. on March 24, 1992, to give petitioner a chance to bring an application for emergent relief to the New Jersey Supreme Court. The Appellate Division denied the parties all other relief.

Both parties sought leave to appeal to the New Jersey Supreme Court. Respondent requested immediate dissolution of the temporary restraints and dismissal of petitioner's entire complaint. Petitioner requested a continuance of the stay, reversal of the dismissal of his complaint brought as an individual, and a remand of the entire matter to the Chancery Division for a trial on both claims. On March 24, 1992, the New Jersey Supreme Court ruled unanimously to grant all of respondent's requested relief and deny all relief sought by petitioner.

Continuing his crusade, on March 25, 1992, petitioner applied for a stay of the New Jersey Supreme Court's decision to Justice David H. Souter and Justice Clarence Thomas of the United States Supreme Court. Both applications were denied. On March 31, 1992, petitioner moved for reconsideration in the New Jersey Supreme Court of the dismissal of his complaint brought as "guardian *ad litem*" for the fetus. The New Jersey Supreme Court denied that motion on April 6, 1992. Also on March 31, 1992, petitioner moved for reconsideration in the Superior Court of that Court's March 19, 1992 order dismissing the complaint brought on behalf of petitioner

individually. The Superior Court denied the motion on May 12, 1992. On May 18, 1992, petitioner filed a notice of appeal to the Appellate Division from the Chancery Division's order dismissing his claim as an individual.

On June 22, 1992, petitioner filed two separate but nearly identical petitions for writ of certiorari with this Court. Petitioner sought this Court's review of his claim as an individual -- the same claim raised herein -- even though that claim was still pending on appeal in the Appellate Division. In this Court, petitioner argued that the New Jersey Supreme Court's decision in this case was final as to both his claim as "guardian *ad litem*" for the fetus, and his claim as an individual. However, in state court, petitioner maintained that the New Jersey Supreme Court never reviewed his individual claim at all. This Court denied both petitions on October 5, 1992.

Respondent, V.C., filed a Motion for Summary Affirmance of the trial court's dismissal of petitioner's claim as an individual in the Appellate Division on July 31, 1992. On September 21, 1992 the Appellate Division granted respondent's motion, affirmed the trial court's dismissal, and dismissed petitioner's appeal.

On November 4, 1992, petitioner filed a Notice of Appeal to the New Jersey Supreme Court. Respondent filed a Motion for Summary Affirmance or for Dismissal of the Appeal on December 21, 1992. On March 11, 1993 the New Jersey Supreme Court dismissed the appeal, holding that the appeal failed to raise any substantial constitutional question and was governed by this Court's decision

in *Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992).

Petitioner has raised the same claims presented herein through every level of the New Jersey court system, and has been denied relief at each stage. Only the Superior Court of New Jersey, Chancery Division, initially ruled in petitioner's favor when it improperly granted a temporary restraining order prohibiting respondent from obtaining an abortion in the state of New Jersey or leaving the state for this purpose, and appointed petitioner "guardian *ad litem*" for the fetus.[2] This decision was overruled by the New Jersey Supreme Court fifteen days later.

Despite the fact that the New Jersey Supreme Court lifted the restraints improperly imposed on V.C. over a year ago, petitioner has continued to press these same claims at every possible opportunity, forcing V.C. to respond time and time again. Once the New Jersey Supreme Court ruled that petitioner had failed to demonstrate any likelihood of success on the merits, it is inconceivable that petitioner could have believed, in good faith, that his repetitive filings would be successful. Rather, it is clear that these numerous filings were intended to harass respondent, waste the resources of her counsel and the courts, and gain publicity. Our Nation's courts serve the crucial function of deciding important legal questions facing individuals in our society. Usurping the valuable and finite time and resources of

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[2]Notably, even the Chancery Division (the only court sympathetic to petitioner's claims) dismissed the claim petitioner brought as an individual -- the same claim now presented to this Court -- for lack of standing.

the courts for a mere publicity stunt or to advance a personal agenda is an outrage which ought not to be tolerated by this Court.

SUMMARY OF ARGUMENT

Respondent submits this motion for sanctions pursuant to Supreme Court Rule 42.2 and 28 U.S.C. § 1927. Sanctions are appropriate because the petition for a writ of certiorari herein is utterly frivolous and filed in bad faith. The petition fails to present any of the grounds for granting a petition set forth in Supreme Court Rule 10.1; the petition seeks review of the New Jersey Supreme Court's dismissal of petitioner's appeal which dismissal was properly based on this Court's holding in *Casey*, 112 S. Ct. 2791; and petitioner's claims have twice been denied by this Court in rejecting prior petitions for writs of certiorari.

Because this third petition for a writ of certiorari again raises the same frivolous claims, wasting the time and resources of this Court and respondent, the Court should impose sanctions on petitioner as well as his counsel and thereby deter the filing of any further meritless petitions or other applications.

ARGUMENT

I. THE PETITION FOR A WRIT OF CERTIORARI FAILS TO MEET THE CRITERIA OF SUPREME COURT RULE 10.1 (b) AND IS FRIVOLOUS.

The petition fails to establish any of the factors that weigh in favor of review on a writ of certiorari: this Court's prior decisions are dispositive, the New Jersey Supreme Court properly applied those decisions, and no conflict exists among the state or federal appellate courts as to the proper disposition of this case. *See* Sup. Ct. R. 10.1. As every appellate court has recognized, and

as this Court reaffirmed in *Casey*, 112 S. Ct. 2791, *Roe v. Wade*, 410 U.S. 113 (1973) and its progeny clearly protect the right of every woman, including respondent, to choose to terminate her pregnancy prior to viability.

In dismissing petitioner's appeal below, the New Jersey Supreme Court held:

> [Petitioner's] assertion that the matter presents a substantial constitutional question concerning whether a developing human embryo should be regarded as a person from the moment of conception for purposes of constitutional protection under the Fourteenth Amendment . . . is governed by current law, *Planned Parenthood v. Casey*.

Order, N.J. Sup. Ct., Mar. 11, 1993, App. Vol. I, at A-221,222.[3] The New Jersey Supreme Court relied specifically on this Court's decision in *Casey*, and correctly applied that holding as controlling precedent in this case. With this petition, J.M. seeks no less than to overturn *Casey* and *Roe* with frivolous and irrelevant arguments about when life begins.

Just as this Court properly denied petitioner's two prior petitions for a writ of certiorari, the Court should deny this third, equally frivolous, petition. Pursuant to Supreme Court Rule 10.1 (b), the petition for writ of certiorari should be denied because the New Jersey Supreme Court has not "decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." *Id.* The petition raises questions concerning fetal personhood, alleged

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[3]All citations to materials in the appendix refer to Petitioner's Appendices submitted with the Petition for Writ of Certiorari and are cited here as "App. Vol. ___ at A-___."

constitutional rights of a fetus, and alleged rights of a "father" of a fetus to prevent a woman from obtaining an abortion.

In *Roe*, this Court held, "[t]he unborn have never been recognized in the law as persons in the whole sense," and "the word 'person' as used in the Fourteenth Amendment, does not include the unborn." *Id.*, 410 U.S. at 162, 158. In *Casey*, this Court reaffirmed "the essential holding of *Roe*." *Casey*, 112 S.Ct. at 2804. Justice Stevens, reiterated:

> Thus, as a matter of federal constitutional law, a developing organism that is not yet a "person" does not have what is sometimes described as a "right to life." This has been, and by the Court's holding today, remains a fundamental premise of our constitutional law governing reproductive autonomy.

Id. at 2839 (Stevens, J., concurring in part and dissenting in part). Thus, this Court's holding in *Roe*, that the fetus is not entitled to legal status as a "person" or to constitutional protection, remains the law of the land and petitioner's assertions otherwise are utterly frivolous.

II. SANCTIONS ARE APPROPRIATE PURSUANT TO SUPREME COURT RULE 42.2 AND 28 U.S.C. § 1927 BECAUSE THE PETITION FOR CERTIORARI IS FRIVOLOUS.

Petitioner's actions evidence a blatant disregard for the limited resources of the legal system, and this court should impose sanctions on petitioner, as well as his counsel, for once again filing a frivolous, unmeritorious claim. Supreme Court Rule 42.2 provides in relevant part, "When a petition for a writ of certiorari . . . is frivolous, the Court may award the respondent . . . just damages and single or double costs." *Id.* Further, 28 U.S.C. § 1927 provides, "[a]ny attorney . . . who so multiplies the

proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." *Id.*

Members of this Court have advocated sanctions for frivolous appeals or petitions for writ of certiorari. *See, e.g., Talamini v. Allstate Insurance Co.*, 470 U.S. 1067, 1071 (1985) (denying certiorari) (Stevens, J., concurring) ("if it appears that unmeritorious litigation has been prolonged merely for the purposes of delay, with no legitimate prospect of success, an award of double costs and damages occasioned by the delay may be appropriate."); *id.* at 1073 (opinion of Burger, J., C.J.) ("Judicious use of the sanction of Rule 49.2[4] in egregious cases . . . should discourage many of the patently meritless applications that are filed here each year"); *Crumpacker v. Indiana Supreme Court Disciplinary Comm'n*, 470 U.S. 1074 (1985) (opinion of Burger, C.J.); *Southern Railway Co. v. Gadd*, 233 U.S. 572, 581 (1914).

Rule 42.2 serves as both a punitive measure for the petitioner and as a means of compensation for the respondent. An "effort to invoke the Court's jurisdiction on an utterly frivolous claim should subject the attorney who filed the jurisdictional statement to the sanction of [Rule 42.2] of this Court." *Crumpacker*, 470 U.S. at 1074. Where a petition for a writ of certiorari "is so unsubstantial as to be frivolous, a penalty may

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[4]The text of Supreme Court Rule 42.2 was previously contained in Rule 49.2.

be imposed." *Slaker v. O'Connor*, 278 U.S. 188, 190 (1929) (dismissing appeal and assessing damages). In *Slaker*, this Court ordered damages because, "without any authority of law, the appellant obtained an appeal. Thereby . . . he needlessly consumed [the Court's] time and imposed serious delay upon the appellees and otherwise burdened them." *Id.* at 191. *See also Mississippi Central R. Co. v. Smith*, 299 U.S. 518 (1936) (assessing damages against appellant whose appeal was dismissed for want of jurisdiction; treating the appeal papers as a writ of certiorari, the Court also denied certiorari); *Wagner Co. v. Lyndon*, 262 U.S. 226, 233 (1923) (dismissing appeal for lack of jurisdiction "because the grounds of appeal are frivolous" and imposing sanctions).

Where, as here, a party petitions for certiorari despite the fact that the claim has been carefully considered by the courts below, this Court should impose sanctions. *See Hagerty v. Keller, Executor of the Succession of Clement, et al.*, 474 U.S. 968 (1985) (denying certiorari) (Opinion of Burger, C.J.) ("[t]he time has come -- indeed it is long past -- when the Court should enforce Rule [42.2] or strike it." *See also Southern Railway Co.*, 233 U.S. 572. As in *Hagerty*, where Chief Justice Burger found, "[i]t is evident . . . that petitioner and his counsel have filed in this Court a completely frivolous petition as the most recent in a series of patently unfounded suits," 474 U.S. at 970 (Opinion of Burger, C.J.), petitioner here has raised these same claims at every level of the state court system; indeed, while petitioner in

Hagerty filed only one meritless petition, the petition herein is J.M.'s third frivolous attempt to obtain review by this Court.

When, as here, the controlling law is clear and undisputed, a petition for writ of certiorari questioning that law is frivolous. *See Roe v. Kansas*, 278 U.S. 191 (1929) (dismissing writ of error). In *Kansas*, the plaintiff challenged a statute which empowered the State to take by eminent domain land possessing historical interest, claiming that the statute violated the Due Process Clause of the Fourteenth Amendment. Because the statute's meaning was clear and the Court had no basis to doubt the power of the State to enforce it, the Court required the plaintiff to pay a penalty and costs to the defendant holding, "[t]he alleged ground for the present writ is without substance, and the circumstances justify the imposition of a penalty upon the party at fault." *Id.* at 193.

The petition herein flouts clearly established precedent. Because the New Jersey Supreme Court in dismissing petitioner's appeal, relied specifically on *Casey*, 112 S. Ct. 2791, this petition contests binding and dispositive precedent in the most frivolous and disrespectful manner. Like the two prior petitions in this case, the outcome of this petition is evident based on well-established precedent. Petitioner and his counsel should be sanctioned for pursuing such a frivolous claim which has clearly been filed in bad faith, without any prospect of prevailing. Petitioner's ongoing filings constitute a flagrant misuse of the judicial system, as well as blatant disrespect for the judgment of this Court. Such conduct is well deserving of sanctions, if only

to prevent J.M. from petitioning yet again for certiorari or from filing other applications for reconsideration in this case.

Although this Court rarely utilizes its power to impose sanctions, it should do so here because petitioner's conduct clearly falls within the scope of the Rule; indeed, the purpose of the Rule is to discourage precisely the type of frivolous litigation pursued by petitioner herein from crowding the Court's already overburdened docket. The petition currently before the court is the third filed by petitioner; the prior two petitions were denied by this Court on October 5, 1992. The present petition raises essentially the same issues as were raised in the petitions denied last year. Neither the facts nor the law on which the claims are based have changed in the intervening time. Therefore, the arguments contained in the present petition have already been found insufficient to merit granting a petition for writ certiorari and raising them again serves no purpose other than unnecessary delay and waste of respondent's and the Court's resources.

Advancing this meritless claim a third time has resulted in unnecessary added financial burden, causing respondent to file another Brief in Opposition to Petition for Writ of Certiorari, a Brief in Opposition to Motions for Leave to File Amicus Briefs, and the present Motion for Sanctions. Because petitioner's frivolous filings have necessitated a duplication of the efforts of both this Court and respondent's counsel, petitioner should be sanctioned and respondent should be compensated for her costs.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that this Court order sanctions, pursuant to Supreme Court Rule 42.2 and 28 U.S.C. § 1927, of single or double costs in the amount of $600 (or $1,200) and just damages as the Court deems proper.

DATED: July 7, 1993

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CERTIFICATE OF SERVICE

I hereby certify that I have this 7th day of July, 1993, deposited a true and correct copy of RESPONDENT'S MOTION FOR SANCTIONS in the United States post office in New York, New York, with first-class postage prepaid, addressed to:

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Cassidy, Foss & Can Filippo
225 Broad Street
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Lenora Lapidus
LENORA LAPIDUS

Sworn to before me this 7th day
of July, 1993.

Eric C. Gantman
Notary Public, State of New York
No. 31-4965633
Qualified in New York County
Commission Expires 4/23/94

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No. 92-1934

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

J.M., Individually

Petitioner,

-against-

V.C.,

Respondent.

On Petition for Writ of Certiorari
To the Supreme Court of

BRIEF OF PETITIONER IN OPPOSITION TO RESPONDENT'S MOTION FOR SANCTIONS

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INTRODUCTION

The attorneys for V.C. have moved this Court to impose sanctions and damages against petitioner and his counsel.[1] In opposition to the motion J.M. relies upon his petition and his reply brief previously filed with the Court and submits his personal affidavit, the affidavit of the counsel of record, the brief contained in these papers in opposition and additional appendices relevant to this motion.

STATEMENT OF THE CASE

The petitioner's statement of the case is found in the petition at p. 3 to 10. A supplemental statement of the case is found in petitioner's reply brief at p. 13 to 16. In addition, further procedural facts and information pertinent to this motion are contained in the argument found below.

SUMMARY OF ARGUMENT

The case of J.M. v. V.C. is probably the best case and the best opportunity for this Court to review and decide important issues under the Fourteenth Amendment which have never been decided by this Court. J.M.'s petition is properly before this Under under 28 U.S.C. §1257, and the filing of a petition in 1992 neither impairs this Court's jurisdiction nor limits the issues under review. The respondent's motion, and the character of her arguments in support of it illustrates the need for this Court to grant certiorari in this case. The motion must be denied.

[1] There is no evidence in the record that V.C. has personally approved or sanctioned the motion or is even aware of the fact that it has been filed.

ARGUMENT

Introduction

The argument of V.C.'s attorneys on their motion has essentially two elements, neither of which support the denial of certiorari, much less imposition of sanctions, and both, when carefully examined, actually support reasons why certiorari should be granted in this case.

First, V.C.'s attorneys argue that J.M. should be sanctioned because he has previously filed a petition in this Court in 1992. V.C., however, does not now argue that this petition is not properly before this Court or that the Court lacks jurisdiction based upon "finality" under 28 U.S.C. §1257. In fact, V.C. strenuously argued that this Court actually lacked jurisdiction in 1992 to hear any aspect of the case and she expressly argued that the only time this Court would have jurisdiction would be when this precise petition would be filed.[2]

The second element of respondent's argument is that the issues J.M. raises have been previously resolved by this Court and J.M. and future litigants should be punished for attempting to present them. In fact, a fair review of the record on this petition will reveal that V.C. has not responded to the real issues presented by

[2] It should be obvious why a petition was filed in 1992 although the case was still pending in the Appellate Division. See argument below at p. 3 to p. 12; see also, affidavit of Harold J. Cassidy at A-5 to A-13. J.M. had acknowledged that his case, in the summer of 1992, was indeed still pending in the Appellate Division of the Superior Court of New Jersey. At that time J.M. simply argued that the Court could hear the case in its discretion, not that it was the only time the Court would have jurisdiction.

this case and none of the authority she cites has directly decided the substantial constitutional questions of first impression J.M. has raised. That the Court has never ruled on these important issues supports the need for review in this case, not sanctions to silence J.M. and others similarly situated.

I. THIS COURT NOW HAS UNCONTROVERTED JURISDICTION OF THIS CASE UNDER 28 U.S.C. §1257. THE FILING OF A PRIOR PETITION FOR DISCRETIONARY REVIEW IS IRRELEVANT TO BOTH THE COURT'S JURISDICTION AND THE MERITS OF THIS PETITION.

V.C. argues, without a legally cognizable basis, that this petition is "frivolous" because J.M. filed a petition with the Court in 1992 while his case was still pending in the Appellate Division of the Superior Court of New Jersey. The petitions filed in this Court in June of 1992 are irrelevant to both the jurisdiction of this Court and the merits of the petition.

A. THIS COURT HAS JURISDICTION OF THIS PETITION UNDER 28 U.S.C. §1257 AND THAT ISSUE IS NOT IN CONTROVERSY.

This petition was filed seeking review of the final order of the New Jersey Supreme Court dated March 9, 1993, which finally resolved J.M.'s appeal to that court. It is, without any doubt, a final judgment rendered by the highest Court of the State of New Jersey and this Court has jurisdiction under 28 U.S.C. §1257. The respondent does not argue otherwise. Neither her response brief, nor her motion for sanctions contain any suggestion that this Court lacks jurisdiction under 28 U.S.C. §1257.[3] In fact, when J.M.

[3] V.C. does challenge jurisdiction, but based solely upon "standing" and "state action". J.M.'s petition and reply brief address those arguments. Here, J.M. only refers to the nature of the order appealed from as it relates to jurisdiction.

filed the petitions in June of 1992, V.C. argued to this Court that because J.M.'s individual case was pending in the Appellate Division of the Superior Court of New Jersey, and the child did not exist, this Court was barred from reviewing both J.M.'s case and the "child's case" and the Court was without jurisdiction until J.M.'s individual case was finalized and this particular petition was filed. The point concerning J.M.'s case is best made by quoting V.C.'s argument to this Court at that time in 1992:

> A. There Is No Final Judgment Regarding Petitioner's Claims As An Individual.
>
> Petitioner initiated this case in the State trial court with a complaint seeking an injunction prohibiting respondent from obtaining an abortion. Petitioner brought the complaint on behalf of himself and as guardian *ad litem* for the fetus. ...
>
> Following the New Jersey Supreme Court's order denying him leave to appeal, petitioner returned to the trial court and moved for reconsideration of the order dismissing the complaint brought on behalf of petitioner individually. When the motion for reconsideration was denied, petitioner filed a notice of appeal of the trial court's dismissal of his individual claim. *This appeal was as of right and timely filed, and it is still pending in the Appellate Division of the New Jersey Superior Court.*[2] (Emphasis not in original.)
>
> Under 28 U.S.C. § 1257, Supreme Court review of State court decisions is available only with respect to "[f]inal judgements or decrees rendered by the highest court of a State in which a decision could be had." This "final judgment rule" is the first requirement for jurisdiction under Section 1257. Generally, to be reviewable the State court judgment "must be subject to no further review or correction in any other state

[2] Petitioner's appeal to the Appellate Division is as of right pursuant to N.J. Ct. R.2:2-3(a)(1). Although the notice of appeal was filed more than 45 days after the order dismissing the complaint brought by petitioner individually, *see* N.J. Ct. R. 2:4-1(a), the time for filing was properly tolled by petitioner's motion for reconsideration. *See* N.J. Ct. R 2:4-3(e); N.J. Ct. R. 4:49-2.

tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street R. Co. v. Railroad Comm'n*, 324 U.S. 548, 551 (1945).

The finality rule "serves several ends: (1) it avoids piecemeal review by federal courts of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real 'case' or 'controversy' in the sense of Art. III; (3) it limits federal review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs." *North Dakota Pharmacy Board v. Snyder's Stores*, 414 U.S. 156, 159 (1973).

Although a State trial court order may qualify for review under Section 1257, this is true only if the order cannot be reviewed by *any* State appellate court. *See Grovey v. Townsend*, 295 U.S. 45, 47 (1935). But where there is an appeal as of right in a higher court, or even if discretionary review is available, such review must be sought. *See Benton v. Maryland*, 395 U.S. 784, 786 (1969); *Tumey v. Ohio*, 273 U.S. 510, 515 (1972).

In this case, petitioner has properly taken an appeal as of right from the trial court's decision to dismiss his individual complaint, and that appeal is still pending in the New Jersey Superior Court, Appellate Division. *The appeal raises all the same federal constitutional issues petitioner seeks to raise before this Court. This pending appeal in the New Jersey State court system bars review of petitioner's claim in this Court.* (emphasis not in original.)

Citing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), however, petitioner argues that the pending State court appeal does not preclude jurisdiction under Section 1257. (Citation omitted.) ...

But although *Cox* represents the "practical rather than a technical construction" this Court has applied to the finality requirement, *see Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949), this approach is not meant to "swallow the rule" of finality embodied in Section 1257, *Flynt v. Ohio*, 451 U.S. 619, 622 (1981), and in situations falling outside the categories mentioned in *Cox*, it still remains true that the existence of pending State court proceedings will preclude review in this Court. ...

None of the *Cox* exceptions to the finality rule

> apply in this case simply because the New Jersey Supreme Court's decision never reviewed the trial court's dismissal of petitioner's complaint brought on behalf of himself at all, but instead merely denied leave to appeal. *The issues raised in petitioner's pending appeal in the New Jersey Appellate Division are not collateral state-law issues, but are the very same federal issues petitioner seeks to bring before this Court. Consequently, petitioner's federal issues have not yet been conclusively adjudicated in the State courts, and there is no final judgment on his federal claims brought as an individual.* Therefore, this Court lacks jurisdiction under Section 1257.[3] (emphasis not in original)
>
> [3] Petitioner's reliane on 28 U.S. §1651 as an alterantive basis for jurisdiction is misplaced. ...

It is clear that [1] the Court now has jurisdiction of this case; [2] there has never been a review of this case on the merits; and [3] V.C. expressly acknowledges that there is nothing about the nature of the order from which review is sought that prohibits jurisdiction under 28 U.S.C. §1257.

B. THE 1992 FILING OF THE PETITION IN THE CHILD'S CASE NEITHER IMPAIRS THE COURT'S PRESENT JURISDICTION NOR LIMITS THE ISSUES TO BE REVIEWED.

The petition filed in this Court in the child's case in 1992 does not preclude this Court from reviewing any of the issues J.M. individually litigated in the State court, including those pertaining to the rights of the child. There are five reasons which, taking separately and in combination, support this conclusion.

First, the child had died before a petition could be filed in this Court. Although the child was a separate, complete, unique, individual person prior to death, that person was no longer alive to prosecute the action after March 24, 1992 and had never been

given an opportunity to appeal with a meaningful hearing.

Second, even while the child was alive the New Jersey Courts never appointed a Guardian Ad Litem in the "child's case,"[3] the child lacked legal capacity to prosecute the action,[4] and therefore no person was given the legal authority to prosecute the child's case. Indeed, the Chancery Court's dismissal of J.M.'s individual claim was based upon its rulings that J.M. had no standing to prosecute the child's case, that J.M. had no right to be the Guardian, and that the child had no right to be represented by his or her father - all of which are among the very issues litigated in J.M.'s individual case.

Third, a denial of certiorari in this case based upon the filing of the child's petition would require a specific finding that the March 24, 1992 order was the *only* order from which the petitioner could seek review of the child's rights issues. Such a ruling would require this Court to hold that the child was in fact a complete, separate, unique human being capable of prosecuting his

[3] The Chancery Court's comments made it clear that the Court believed that J.M. had no standing to prosecute the child's case, but that the Court had to appoint a Guardian or there was no "case" to prosecute. Nonetheless, the Court never entered an order making an appointment. see, portions of the proceedings in the Chancery Division on March 19, 1992 found at A-14 to A-18. The Court never thereafter had a chance to appoint a guardian because the child died five days later on March 24.

[4] In New Jersey a child does not have legal capacity to litigate a civil suit before the age of 18 years. N.J.S.A. 17B-1 et seq. Pursuant to Court rules, all children under that age must be represented by a Guardian Ad Litem. (see, R. 4:26-2) and in some cases the rule specifically authorizes the appointment of such a guardian for children after conception, but prior to birth. See, R 4:26-3(a) and 4:26-3(c).

or her case - one of the most important issues presented by J.M.'s petition and one which this Court has never ruled upon. For that to be the basis for denying the writ on this petition, this Court would be required to make that explicit determination now.

Fourth, regardless of the fact that the child, before the child's life was terminated on March 24, 1992, was a living person, and whether or not the denial of the child's petition in October of 1992 is viewed as dispositive of the "child's case," J.M., under both New Jersey and Federal law, is nonetheless entitled to litigate all the issues his complaint presented including the rights of the child. Neither the doctrines of *res adjudicata* nor collateral estoppel bar J.M. individually from litigating issues that could be inferred to have been litigated by the child's case.[5] V.C. argued to the New Jersey Supreme Court in November, 1992 that J.M. should not be permitted to file an overlength brief which addressed all of the child's rights issues. The New Jersey Supreme Court rejected V.C.'s contentions and entered the order granting J.M. leave to file the arguments.

Finally, and perhaps most importantly, this petition is the only practical opportunity that this Court has been given to review the important issues this case presents. The death of the child, and the policy behind the non-mootness doctrine in pregnancy cases, requires this Court to give J.M. a practical opportunity to present all of the issues once his case was finally reviewed by the New

[5] See portion of one of J.M.'s briefs filed in the New Jersey Supreme Court which addresses this point found at A-19 to A-27 following this brief.

Jersey Supreme Court. The death of the child rendered J.M.'s the only case to review.

The policy behind the non-mootness doctrine expressed in *Roe v. Wade*, 410 U.S. 113, 124-125 (1973) is that the law cannot be so rigid that its application would effectively deny review. J.M. aggressively and diligently sought review of the issues at every level. The record in his own case was not complete until March 11, 1993, when the final order of the New Jersey Supreme Court was entered that day. Until them J.M. was not *entitled* to file a petition that would cover all of the issues he raised in this case. By the rule of law epitomized by *Roe*, J.M. is entitled to a practical opportunity to have all issues reviewed.

Under New Jersey law there were two factors which required the New Jersey Supreme Court to permit argument on all of the issues presented by J.M.'s individual case. First, there were the special circumstances that existed on March 24, 1992 which prevented the case from obtaining, and the New Jersey Supreme Court from providing, a full and complete hearing and determination of the issues. See, *Zoneraich v. Overlook*, App. Div. 514 A.2d 53, 58-59 (1986). On March 24, 1992, the New Jersey Supreme Court felt compelled to vacate the restraints expeditiously, thereby terminating the child's life, or it would be in violation of what it apparently believed was the mandate of this Court. Consequently, the Court did not provide a meaningful appeal. Second, the New Jersey Courts have found, that, as a matter of law, even in situations where collateral estoppel would otherwise have

application, where the public interest militates against the preclusive effect of a prior order, the Court should entertain an appeal. *Zoneraich v. Overlook, supra.*[2]

Granting review with adequate time to determine the facts is actually the only way that a full review of the issues can be obtained, and if the Court does not take the opportunity to do so the very substantial issues shall be repeated while evading review. *Roe v. Wade*, 410 U.S. at 125; see, *In the Matter of Conroy*, 486 A.2d 1209, 1219 (1985). Certainly, this Court had the discretion, in October of 1992, when it reviewed the petition in the child's case to wait until all issues as to both the father and child were the subject of a final order entered by the New Jersey Supreme Court. That did not occur until March 11, 1993. As a practical matter, this has always been only one case.

II. J.M.'S PETITION PRESENTS MERITORIOUS ISSUES WHICH HAVE NEVER BEEN DECIDED BY THIS COURT AND ISSUES THAT ONLY THIS COURT CAN RESOLVE. ASPECTS OF RESPONDENT'S MOTION SERVES TO ILLUSTRATE WHY CERTIORARI SHOULD BE GRANTED IN THIS CASE.

A.

On this motion J.M. relies upon the substantive arguments found in his petition and Reply Brief. V.C.'s arguments on this

[2] The public interest always bears upon matters pertaining to the relaxation of procedural rules and bars of all types which would otherwise frustrate the review of matters that affect the public interest. See, *Bd. of Ed. of Elizabeth v. City Coun. of Elizabeth*, 262 A.2d 881 (1970); *DeSimone v. Greater Englewood Housing Co.*, 267 A.2d 50 (1970); *Enourato v. N.J. Buildg.*, 440 A.2d 42 (1981) aff'd 448 A.2d 449 (1982); *In the Matter of Baby M*, 537 A.2d 1237, 1263-1264 (1988); *Hudson City v. Hampton Gardens Ltd.*, 438 A.2d 323, 327 n 5 (1981); *Gilborges v. Wallace*, 379 A.2d 269 (1977); *Atlantic City Casino Assoc. v. Kimmelman*, 508 A.2d 203 (1985); *Morales v. Cty of Hudson*, 566 A.2d 191, 198 (1989); *State v. Maure*, 573 A.2d 186 (1990); and *State v. Davis*, 477 A.2d 308 (1984).

motion actually underscore the reasons why the writ should be granted in this case: the prior case law simply bears no relevance to the substantive issues of when life begins and whether a child possesses rights prior to birth based upon the child's personal interest in life. The non-responsive nature of V.C.'s briefs reflects the fact that the "state's rights" genre of cases (now arguably exhaustive on questions concerning a woman's privacy interest when examined independently of the child's rights) never decided the issues presented by this case. Only if it is irrelevant that abortion is the intended, unjustified, and painful termination of the life of a human being, and these sentiments - that these facts are irrelevant to justice - have been expressed by this Court in past opinions, can V.C.'s motion be granted. Otherwise, the writ of certiorari should be granted and the Court should review this case.

B.

There is a lack of reason in respondent's argument which requires comment. V.C.'s attorneys argue that J.M. should be punished for: [1] pursuing a "crusade";[3] and [2] "advanc[ing] a personal agenda",[4] and sanctions should be imposed to "deter",[5] (presumably others) from attempting to have this Court address the substantive issues this case presents.

[3] P. 3 of moving papers, attorneys state: "continuing his crusade, on March 25, 1992 ..."

[4] P. 6 at top of V.C.'s moving papers.

[5] P. 6 of V.C.'s moving papers.

The emotionalism underlying these insensitive remarks illustrates an important reason why certiorari should be granted. What is called a "crusade" was on March 25, 1992, J.M.'s last effort to save the life of his child when neither he nor his attorney yet knew that the child's life had been terminated [see affidavit of J.M. found in appendix to this brief at A-1 to A-4; see also affidavit of Harold J. Cassidy at A-5 to A-13]. To find any reasonable interpretation in these remarks one must recognize that there is a deep and broad divide between J.M.'s knowledge that his was an attempt to save the actual life of a human being to whom he had responsibility, while respondent's attorneys are apparently reacting to an abstraction that is neither human, nor of value.

It is ironic that the attorneys from the Center for Reproductive Law and Policy would accuse an anonymous man, motivated by love, and a sense of obligation (see affidavit of J.M. at A-1 to A-4), as the party to this suit who is pursuing an agenda or crusade. It is the opposite of the reality. J.M. had a personal stake in a personal tragedy. He seeks only to have his case reviewed.[6]

[6] By contrast, the Center for Reproductive Law and Policy exists for the purpose of the promulgating what may be viewed as an extreme point of view. *The Center For Reproductive Law and Policy*, formerly a part of the A.C.L.U. has been involved in a significant amount of the pregnancy litigation in the past. Its involvement in similar litigation makes their statements that they thought this case would be over on March 24, 1992, [and that continuing it is a "crusade"] not only odd but incredible. Indeed, *The Center For Reproductive Law and Policy* is involved in representing the plaintiff in the matter of *Leona Benton v. David Kessler*, in which a woman is suing the Commissioner of the F.D.A. because a drug known as RU-486 ("morning after pills") was taken from her at Kennedy Airport in July 1992. She did not take the drug while in

The differences between the perspective of the two litigants is that one understands that the child is an actual human being to whom both parents have obligations. The respondent's attorneys argue from a narrow perspective which focuses only on some interests of a woman, seen in a vacuum, without regard to her other interests, and the interest of the child in life.

As long as the focus of the legal inquiry is the narrow one of government interfering with a woman's private life, the emotion expressed by V.C.'s attorneys is understandable. In that context any questioning of a woman's freedom will be met with an intolerance stemming from a justifiable insistence upon respect for the equality of women and an end to discrimination of women in society generally.

This narrow focus which ignores the children, many of whom are female (who may become specific targets of abortion based on gender), and fails to consider a woman's dignity and interests as mother, creates the paradox that many women - some have suggested most women - feel that the institution of abortion is the ultimate exploitation of women and the suggestion that women need a "right"

Europe or on the plane home in order to create a "test" case with the assistance of defendant's lawyers from *The Center For Reproductive Law and Policy*. The stay of the government's action was denied by the United States Supreme Court. U.S. Sup. Ct., A-40, July 17, 1992, 112 S.Ct. 2921. Although the plaintiff in that case asserts that she had a surgical abortion following the denial of the stay, *The Center For Reproductive Law and Policy* is pursuing the matter in the United States Court of Appeals for the Second Circuit. The Center's "agenda" driven litigation is in stark contrast to the personal nature of J.M.'s case.

to kill their own children to achieve equality is degrading.[7] These contradictions can only be resolved by this Court examining the rights of a mother in the context of the child's interest in life, and by moving beyond the narrow inquiry, on which V.C. focuses, of some of a woman's interests weighed against the narrowly defined interest of the state.

III. THIS CASE PRESENTS THE BEST OPPORTUNITY FOR THIS COURT TO REVIEW THE SUBSTANTIVE ISSUES IT DIRECTLY PRESENTS, INCLUDING: WHEN DOES THE LIFE OF THE CHILD BEGIN AND WHETHER THE CHILD HAS RIGHTS PRIOR TO BIRTH.

It appears that this particular case presents the best and most important opportunity for this Court to resolve the questions previously unresolved by this Court, including when the life of the child begins, whether the child has rights prior to birth, whether a mother's interests identified by *Roe* give rise to a right to abortion when balanced against the child's personal interest in life, and whether a father has standing to litigate his child's rights. There are at least seven reasons why this case constitutes the best opportunity for the court to decide these issues.

First, the timing of the case is important. This petition comes to the Court after the state's interest cases have been exhausted (e.g. *Casey*, *Guam*, *Louisiana* etc.). The most significant aspects of the balancing of a woman's privacy interest against the generalized interest of a state have been, apparently, finally resolved. Only questions relating to the child's rights remain.

[7] See Amicus Brief of Feminists for Life, et al, *Bray v. Alexandria Hewelth Clinic*, U.S. Sup. Ct. Docket Number 90-985 (1991)

These questions are best determined in the context of the personal interest in life of a particular child. It would also seem highly unlikely that a state would now pass legislation which directly implicates the child's interest, or attempts to protect the child's personal interest in life.[8]

Second, the fact that New Jersey authorizes terminations of the children's lives both before and after "viability" presents questions that cases from other jurisdictions would not present. The obvious humanity of the child after viability and the obvious cruelty of unjustified dismemberment and death of these children require this court to review the rights of these children now. The New Jersey Supreme Court has made it clear that it believes that these issues are only within the province of the nation's highest court. It is fair to infer that the New Jersey Courts will be guided by what this Court does on this petition. It is highly unlikely that a future litigant, in New Jersey, would be permitted to make an adequate record for review by this Court, or obtain an injunction of an abortion for any period of time.

Third, this case includes the history of an entry of an injunction. Although there is "state action" without the entry of this injunction, (and the "state action" analysis absent the

[8] The timing of the case also seems important because it would only be just if the child's rights are reviewed before the realization of imminent social conduct that will seriously compromise those rights. The so-called "morning after pill" may be approved for marketing within a year. The practice of surrogate mothering is in its infancy, and granting rights to terminate the life of the child to a mother in such a circumstance may result in cruel, offensive and unjustifiable harm (see, Pet. p. 51-52).

injunction is an important one in determining the ultimate consequences of a finding that the child possesses rights prior to birth) the issuance of the injunction places beyond doubt the existence of state action, which is important on the review of a petition for certiorari in the effort to avoid issuance of improvident writs. If certiorari is denied in this case, it is unlikely that another case shall be presented to this Court with the prior entry of an injunction, and surely little or no chance that an injunction would be entered in a New Jersey case or another state which authorizes post "viability" terminations.

Fourth, the record in this case is impeccable in terms of preservation of all of the pertinent issues, and direct preservation of the scientific and medical record. All of the issues and the scientific and medical arguments were not only preserved, but in every instance the issues and scientific documentation was filed with express leave of the New Jersey Supreme Court. It is especially advantageous that the scientific and medical arguments were preserved without this Court being burdened at this point with findings of fact. This Court could never be bound by a state's finding on the question of when the life of a child began because of the implications such a finding would have for the substantive constitutional rights of the parties. In fact state legislatures (and a United States Senate Committee) have held extensive hearings resulting in findings that the life of a child begins at conception. This court has rejected the authority of those political bodies to bind this Court, and it

is clear this Court reserves the power to determine when life begins to itself. The record in this case provides the flexibility needed for this Court to arrive at the truth and to do justice.

Fifth, while it is demonstrably preferable, and perhaps even necessary, for this Court's jurisdiction, that the issues be directly litigated by the mother, child and father, the procedural path to this Court is especially difficult emotionally for the litigants (see affidavit of J.M.) and constitutes a financial hardship. It is simply unfair to all of the children now conceived, and those to be conceived in the near future to require them and their parents to follow the painful path J.M. and the child followed to obtain a fair review of a case sometime in the future. In addition, denial of certiorari in this case would make preservation of a record in the future more difficult.

Sixth, the procedure employed by the New Jersey Courts in this case is, in retrospect, probably the best one to result in a reviewable record. Clearly, the State Supreme Court felt absolutely bound to vacate the injunction under the current case law. Under such circumstances there can never be a fact finding trial in a state court unless this Court directs that it be provided. At the same time, the New Jersey Courts allowed the petitioner to make his record on the issues and the scientific facts so this petition could be presented. In retrospect it is probably the only way the New Jersey Supreme Court could both give this Court an opportunity to review the legal issues, while being true to its obligation to follow what it interprets this Courts'

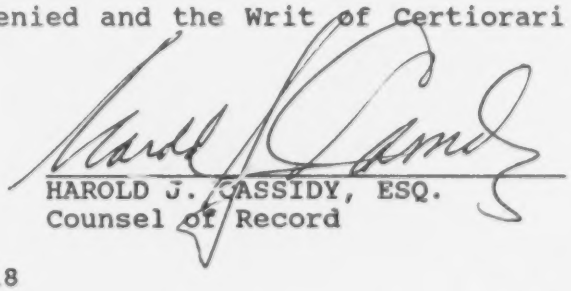
prior holdings.

Seventh and lastly, J.M. respectfully suggests that repose in the law can be achieved only after the rights of the child, as a legal issue, is determined by this Court, no matter how the Court rules. No case will more directly present those issues than a civil suit between two parents who disagree on whether their child should live or die.

CONCLUSION

This being the best opportunity for the issues to be determined by this Court, V.C.'s Motion for Sanctions and damages must be denied.

This court now has uncontroverted jurisdiction of this case under 28 U.S.C. §1257. The filing of a prior petition for discretionary review is irrelevant to both the court's jurisdiction and the merits of this petition. J.M.'s petition presents meritorious issues which have never been decided by this court and issues that only this court can resolve. Respondent's attorneys' emotional rhetoric serves to illustrate why certiorari should be granted in this case. This case presents the best opportunity for this court to review the substantive issues it directly presents, including: when does the life of the child begin and whether the child has rights prior to birth. The Motion of V.C. seeking sanctions and damages must be denied and the Writ of Certiorari should be granted.



HAROLD J. CASSIDY, ESQ.
Counsel of Record

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No. 92-1934

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

J.M., Individually

Petitioner,

-against-

V.C.,

Respondent.

On Petition for Writ of Certiorari
To the Supreme Court of New Jersey

AFFIDAVIT OF THE PETITIONER, J.M. IN OPPOSITION TO RESPONDENT'S MOTION FOR SANCTIONS

J.M., being of full age, deposes and says:

1. I am in fact the petitioner in this matter whose identity is disclosed in papers under seal with the New Jersey Supreme Court (and lower courts). I prepare and sign this Affidavit with the assistance and in the presence of Mr. Cassidy to whom I am well known and recognized since he has been my attorney since the beginning of this lawsuit. I submit this affidavit in opposition to a motion by V.C.'s attorneys seeking sanctions and damages against my lawyer and perhaps even myself.

2. When I first consulted Mr. Cassidy on March 6 and 7, 1992 I sought the services of a lawyer because V.C. and I had a new child whose actual life was real and irreplaceable. It was not

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possible for me to personally deny the reality that I had obligations to our child, and that the baby was a real, living individual human being. Mr. Cassidy was referred to me by another lawyer in private practice in Monmouth County.

3. Although I was sad that V.C. and I were in disagreement over whether our child should live or die, I knew that the child's life had to be weighed against any of the concerns or perceived problems that V.C. faced. I certainly was not, and am not now, in a position to make judgments for V.C. that are legitimately hers alone, nor do I wish to do so. My concern was primarily that of the welfare of our child and I concluded that before the child's life was taken a Court somewhere should make a judgment on whether it was right that the child should die and balance the right that the child has in life against any considerations that could be used to justify killing the child. There were no medical complications or any other circumstance that could possibly justify the taking of the life of a human being.

4. For me to fail to ask the Court to protect the life of our child would be for me to be in complicity with those who would take the child's life. That was not something that I could do, nor did I think that it was "frivolous" to ask the court, before our child was allowed to be killed, whether the child was a human being with rights. Even if it would be difficult to discharge my responsibility, it was impossible for me to ignore my obligation. If concern for my child's life and my knowledge that the child's life had value equal to other lives, is "frivolous," then I am guilty of presenting a "frivolous" issue to the court. If, on the

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other hand, a child's life is not frivolous then I ask this Court to take this case and review the issues it presents.

5. When my lawyer told me that the Court had continued the restraints on March 19, 1992 I was overtaken by emotion. I felt joy, and relief. When I learned that the child's life was lost I wept. I had my own sense of guilt concerning that loss. I felt the loss of our child, and the mourning I experienced was the same as losing any member of my family.

6. When I was told that the baby's remains could not be given to me for a proper burial, I arranged for a private service at a church in Monmouth County, New Jersey. A small group of my family was present.

7. I have seen that all three of us - V.C., our child, and myself - have suffered as a result of this abortion "right". There is a prior affidavit in the record in this case concerning V.C.'s decision not to terminate the life of our second child. Her suffering because of the abortion should be apparent. For the sake of our new daughter (born in February 1993) I urge that the identity of V.C. and myself never be revealed publicly. The suffering that I witnessed and experienced during this case should be for a constructive purpose.

8. Shortly after I learned of our child's death through the abortion I determined to see this case through to the end to give this Court an opportunity to examine and decide the issues this case presents. I did not think that this opportunity to decide these issues should be lost. No one else should be required to experience the pain and personal sacrifice that has been

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experienced by V.C., our child and myself so that these issues can be decided. I went through this case to the end so other children, mothers and fathers do not have to have this dreadful experience.

9. When I determined to see this case through to the end, I felt that it was my obligation to do so even though our own child was lost. For one thing, it seemed that after the original order of the New Jersey Supreme Court had been entered and our child's life taken, it was wrong that a final determination should rest with a state court, the final determination of which would ensure the continued death of children such as ours. It was most appropriate that the determination of the important questions of Federal constitutional rights should, and could, rest only with the United States Supreme Court. It seemed to me that it was my obligation to see that the issues be presented to this Court for the benefit of all the other children, and their mothers, and fathers.

10. If my concerns for the life of our child are not "frivolous", that the case does not present frivolous issues, and that they are not issues that have been directly decided before, than I respectfully ask this court to review this case and decide these issues, now, so that no other litigants must be asked to go through what our child went through, what V.C. has gone through and what I have gone through so that this society, this court and this nation can decide these issues.

J.M.

Sworn to and subscribed to before me this 17th day of August, 1992.

HAROLD J. CASSIDY, ESQ.
Attorney at Law State of New Jersey

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No. 92-1934

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

J.M., Individually

Petitioner,

-against-

V.C.,

Respondent.

On Petition for Writ of Certiorari
To the Supreme Court of

AFFIDAVIT OF PETITIONER'S COUNSEL HAROLD J. CASSIDY IN OPPOSITION TO RESPONDENT'S MOTION FOR SANCTIONS

HAROLD J. CASSIDY, being of full age, deposes and says:

1. I am an attorney at law in the State of New Jersey licensed to practice before this Court. I am a member of the law firm of Cassidy, Foss and San Filippo with offices at 225 Broad Street, Red Bank, 07701. I am the counsel of record in the matter of J.M. v. V.C. and I am thoroughly familiar with all aspects of this case from its inception to the present time.

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2. I submit this Affidavit in opposition to a motion filed by the attorneys for the respondent, V.C. Naturally, since the merits of the petition are the subject matter of this motion, petitioner relies upon the petition and J.M.'s reply brief which have been filed with the Court. In addition, J.M. submits a brief in opposition to the motion for sanctions and this affidavit together with the affidavit signed by the petitioner, J.M., setting forth facts which are relevant to the application for sanctions. I certify that J.M., who signed this Affidavit by his initials, is indeed the party litigant to this action. The true identity of J.M. is not contained in the appendix but has been protected by the Order of the courts. The true identity of J.M. and V.C. are found in the documents under seal with the New Jersey Supreme Court. If Certiorari is granted in this case, those sealed documents undoubtedly will be provided to this Court. J.M. signed the Affidavit in my presence in my Red Bank office.

A FATHER'S CONCERN FOR THE LIFE OF HIS CHILD

3. J.M. first contacted and spoke to me in the early evening of Friday, March 6, 1992. I spoke with him in person for the first time on Saturday, March 7, 1992 and I filed the complaint on J.M.'s behalf on Monday morning March 9, 1992. When he first spoke to me on March 6 and 7, 1992, J.M.'s only concern was the welfare of his child. He was obviously distraught over the prospect of the child's life being taken, and all of his statements demonstrated he was motivated by nothing other than a sense of obligation to his child.

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4. J.M. expressed relief by the entry of the order prohibiting the termination of the child's life entered on March 9, 1992. On March 19, 1992 J.M. was at the court house when the Chancery Court refused to vacate the restraint. When I told him that the court had continued the restraints, he became tearful. He expressed joy and relief. He told me that he hoped the case would end at that point and that he and V.C. would raise the child together. He was very emotional and very moved because he thought the child's life might be saved. When the New Jersey Supreme Court vacated the restraints on March 24, 1992 his sadness was very evident. I received word of the Supreme Court's decision late in the afternoon. J.M. and I discussed my preparing papers to file in the United States Supreme Court early the next morning in a last effort to save the child. We had no way of knowing if V.C. would or could be able to terminate the child's life on March 24. I worked late to prepare the application for a stay. I awoke early and drove four hours to Washington, D.C. where I arrived about 9:30 a.m. It was not until the late afternoon of March 25 that I learned that V.C. terminated the child's life late on March 24. I first received this news from a local newspaper reporter who had spoken to V.C.'s attorneys after they issued, unbeknownst to me, a press release. Late in the day on March 25, 1992, I told J.M. that V.C.'s attorneys had indicated that the child's life was terminated. J.M. wept. Within the next day or two he spoke to me on three or four separate occasions. He demonstrated a deep sense of loss, and grief.

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5. On March 26 or 27, 1992 J.M. called me and asked if I could arrange for him to secure the child's remains so that the child could be given a proper burial. I did not encourage him to think that that would be possible, but because of his request I contacted V.C.'s attorneys, and I asked that the child's remains be released to him so that he could give the child a proper burial. When the child's remains were not released to him he expressed sadness. A week or so thereafter he told me that a private service was conducted for the child with a member of the clergy and some of his family present.

6. Had V.C.'s attorneys not filed a motion calling J.M.'s petition frivolous and seeking damages these facts would not be put into this record. It was only after J.M. experienced the very deep and personal sense of loss on March 25, 26 and 27 that he could consider whether to continue the litigation in order to have the courts review the issues he presented in the hope that others would not have to suffer what the child, J.M., and V.C. have suffered. Although many people and many organizations, have expressed support for J.M.'s position on the issues in this case, since the case became public following V.C.'s attorneys' press release, and many have filed amicus curiae briefs, no person and no organization has contributed to the cost of the litigation of this case [except for some direct payments to a printer, which represent less than four percent of the overall expense of J.M.'s litigation; there have also been in-kind services of scientists, doctors, and lawyers].

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THE PROCEDURE IN THIS CASE

7. Beginning on March 9, 1992 when this case began, I used every effort to protect the identities of J.M. and V.C., not only for the sake of the mother and father, but also for the sake of the child. This was something that J.M. wanted very much. The record in this case will reflect that when the Chancery Judge denied J.M.'s original application to protect the identities of the litigants, he moved before the Appellate Division on an emergent application to appeal that interlocutory order. As a result of J.M.'s application, the Appellate Division directed that this matter proceed under the initials of the litigants for the protection of all involved. During a period from March 9 to March 24, 1992 V.C.'s counsel was an attorney named Lewis Robertson, with the firm of Evans, Obsborne & Kreizman, maintaining offices in Little Silver, New Jersey. In one of our first conversations Mr. Robertson and I entered into a "gentlemen's agreement" that neither party would alert the media to this case in order to protect V.C., J.M. and the child. The lawsuit was, despite the magnitude and importance of the issues it presented, a private matter between V.C. and J.M. I honored my commitment not to alert the media to the case as did Mr. Robertson. I first became aware that the Center for Reproductive Law and Policy joined Mr. Robertson in representing V.C. on March 23, 1992 during our appearance in the Appellate Division. When I returned to my office late on March 25, 1992 I learned that V.C.'s new attorneys, the lawyers from The Center for Reproductive Law and Policy and Stryker, Tams & Dill, had prepared and issued a press release on

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March 24, 1992, following the New Jersey Supreme Court's decision, in contravention of our understanding and agreement. Consequently, stories concerning the case appeared in newspapers on March 25 and March 26. As a result of V.C.'s attorneys issuing a press release I received calls from a number of newspapers and radio stations. Any subsequent newspaper stories in the local papers were a direct result of V.C.'s attorneys issuing the press release. Public discussion of the issues presented by this case is by no means improper, but J.M. has never granted an interview with anyone in connection with this case and he has expressly advised me he never will, even as long as he lives. In fact, he is extremely concerned about protecting the identity of V.C. and himself for the sake of their new child born in February 1993. To my knowledge J.M.'s identity is totally unknown to the media. If certiorari is granted, the petitioner requests that the protective Order of the New Jersey Court be continued.

8. As a result of the orders of the New Jersey Supreme Court entered on March 24, 1992, the portion of the case presented as the "child's case" (although no guardian ad litem had ever been appointed), was dismissed without explanation. The father's individual claim and, for all practical purposes, the entire case, was not reviewed by any of New Jersey's appellate courts and the case remained in the Chancery Court awaiting the start of an entire appellate review. The "child's case" was never given an appeal, the Appellate Division refusing to grant leave to appeal, and the New Jersey Supreme Court vacating the restraints within hours. Yet this posed a procedural difficulty for J.M. The lower court, which

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had dismissed J.M.'s case, had ruled that he had no standing and no right to act as guardian ad litem for the child. The court did not appoint a guardian and the matter proceeded rapidly through the appellate courts without any appointment (the Supreme Court order was entered only five days after the Chancery Court's March 19 order). The effect of the New Jersey Supreme Court's order was to prevent the appointment of any guardian and to completely deny review. Although J.M. and his child were two separate individuals, each with the right to prosecute the rights of the child (including the right of the child to have his or her father be appointed as guardian ad litem), the child was treated as non-existent. It was not possible to determine exactly how this or any other court would treat this unusual bifurcation in terms of the "finality" requirement of 28 U.S.C. §1257. We filed a petition in this Court in the summer of 1992 in the "child's case" because it was prudent, and necessary to guard against the eventuality that, by not having done so, V.C.'s attorneys would argue that the right to petition the Court was waived. J.M. was presented with a procedural dilema because the child, even if recognized, did not, under New Jersey law, have the legal capacity to maintain a lawsuit without the appointment of a guardian ad litem, the child had died, V.C.'s attorney argued that perhaps the child had never existed, and the State Court ruled J.M. could not prosecute the child's case. As a practical matter J.M. simply sought to protect the opportunity to have his case reviewed at least once. Under New Jersey law J.M. had his own right to litigate all the same issues concerning the child's rights (see brief submitted in opposition to the motion).

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Because the child's case was filed with the United States Supreme Court, J.M. was compelled to present J.M.'s individual case at the same time, even though under New Jersey law the Chancery Division order was not a final order. This Court could have chosen to grant certiorari in its discretion (even if the Court does not customarily exercise the jurisdiction described in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 459, i.e., treating non-final lower state court orders as "final"). In any event, the Court did not exercise its discretion under *Cox*. Clearly, J.M. can now file a petition because the highest court in the State of New Jersey ruled on his individual case in a final fashion under both state law and §1257. (see pet. Br. in opposition to motion under Point I.)

THE MOTION OF V.C. FOR SANCTION AND DAMAGES

9. The motion filed by V.C.'s attorneys, who include The Center For Reproductive Law and Policy, is replete with emotional rhetoric. The motion is an express effort to discourage future litigation on this topic before this Court. We infer that the emotionalism derives from a heartfelt and sincere belief that a woman's right to equality must be safeguarded, and the historical exploitation of women in this country brought to an end. Those of us who have worked professionally over the years in support of this objective can seek no end inconsistent with it. However, an objective, intelligent, and responsible analysis of the issues presented by J.M. demonstrates that J.M.'s arguments are not inconsistent with the goal of achieving equality for women. To the contrary. Among the large number of women who have expressed support for J.M.'s case, including the 24 or 25 women's

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organizations who have joined friend of the court briefs, are many who have expressed the belief that abortion is the ultimate exploitation of women. Many friends of the court (and potential friends of the court) have expressed a desire to have the opportunity to address this Court on precisely these issues as well as the belief that a woman's real rights cannot be defined without examining all of a woman's interests, those of her child and the mother's obligation to her child.

10. I hereby certify that the foregoing statements made by me are true. I understand that if any of the statements made by me are willfully false, I am subject to punishment.

HAROLD J. CASSIDY, ESQ.

Sworn to before me this
27th day of August 1993.

Attorney at Law
State of New Jersey

Philip E. San Filippo, Esq.
Attorney at Law
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Transcript of Proceedings
Superior Court of New Jersey
Chancery Division - March 19, 1992

P. 20 l. 6 to l. 9

THE COURT: I've already indicated that somebody is going to be a guardian ad litem. It doesn't make any difference to me if he is because who is going to be the somebody it's the lawyer that's going to do the work.

P. 27 l. 6 to p. 28 l. 11

THE COURT: As far as the husband (sic), I think we're finished with him. I've ruled on him.

I guess my question is do you think that I have or do not have the power to appoint a guardian ad litem under these circumstances. (emphasis not in original)

MR. ROBERTSON: I think that you do not have it. The reason that I say that is that *although the answer, the scientific answer to the question when life begins is probably certainly part of the calculus for purposes of determining who's a person within the meaning of 14th amendment,* there is much more involved than simply a scientific inquiry.(emphasis not in original)

THE COURT: I think I noted that at the beginning. I talked about life and then person.

MR. ROBERTSON: Right. And as I understand the argument, the

thrust of the argument of the plaintiff, the plaintiff it seems would suggest that because science can demonstrate, at least according to one theory or one school of thought that life begins at conception, ergo a fetus is a person within the meaning of the 14th amendment and I think that's much too much of a leap.

THE COURT: Only if the court says so.

MR. ROBERTSON: That's right, only if the court says so.

THE COURT: Are we going to have, if we go forward in this case, some opposing views? *It's a fact issue* (emphasis not in original).

MR. ROBERTSON: *I think a mixed question of law and facts.*

THE COURT: *By golly there is a fact in there.*

MR. ROBERTSON: *There certainly is.* (Emphasis not in original.)

P. 30 l. 3 to l. 8

THE COURT: It may be. But in the meanwhile *shouldn't I appoint the guardian ad litem to see if it can be demonstrated?* (Emphasis not in original.)

MR. ROBERTSON: Well, again, *I don't think the question is sufficiently relevant to warrant the appointment of the guardian ad litem in ...* (Emphasis not in original.)

P. 30 l. 14 to P. 31 l. 10

THE COURT: If you digress for a moment and say what we're talking about here, we're talking about what may be life. Maybe, and *if the fetus were asked would say you're talking about my life.* (Emphasis not in original.)

And the real contest that people don't seem to address is the contest between the *mother who has her problem and if there is life, the fetus who's saying nobody is defending my life.* (Emphasis not in original.) Because if it's defended, if somebody defends it successfully, then I'm born.

And the question is, is there a constitutional right to that fetus to be considered a person for constitutional purposes. But fundamental to personhood is, I think, life. And, therefore, shouldn't I give, in a sense, the fetus a chance to demonstrate that it's life.

MR. ROBERTSON: Again, the only answer I could give you is that no court has ever held that a fetus is a person.

THE COURT: Right, and you're absolutely correct, but precisely I think because the fundamental issue of life and when it begins has not been given a test in the courtroom *and in a factual circumstances where somebody has ruled yes or no.* (Emphasis not in original.)

P. 42 l. 13 to l. 24

THE COURT: The injunctive order is effectively to V.C. don't abort that, I'll say fetus because that's a neutral term. Should that injunction continue to remain in place.

That depends on whether or not we have a lawsuit because if I do not appoint a guardian ad litem or say to J.M. that while you designate yourself guardian ad litem of the unborn, that's not real.

If I don't do that, then we have no case and if we have no case we have no injunction. Emphasis not in original.) It's true that the U.S. Supreme Court has not ruled on the issue at least in Roe v. Wade, it doesn't.

It specifically left the field open.

P. 49 l. 7 to p. 50 l. 17

THE COURT: Now, the probability of ultimate success. That's a mixed question. *It's a mixed question of fact and law because I keep saying what is there.* (Emphasis not in original.) I keep saying based upon what is before me and that's a one-sided presentation, I recognize. ... *in deciding this business of when does life begin.*

But I do know that the U.S. Supreme Court has never done that. I do know that the New Jersey Supreme Court has never done that. (Emphasis not in original.) Neither of those courts has had a record which is made in a trial court in a judicial fashion in

which the judge evaluates qualifications.

A judge evaluates the worth of testimony and a judge makes a call one way or the other. The judge can't sit and say we need not resolve the difficult question of when life begins. A trial Judge can't do that. The issue is there. The trial judge has to one way or other resolved it. ...That's what trial judges are. So our Supreme Court in Right to Choose v. Byrne states at page 299 of the opinion in 91 N.J. Reports, "We do not presume to answer the profound questions about the morale, medical and societal implications of abortions nor do we undertake to determine when life begins or at what point fetus is a person."

P. 51 l. 2 to l. 6

THE COURT: *The unborn has to prove, through its guardian ad litem, that it has life. It has to prove, through its guardian ad litem, at what point a court can say that life is equated with a person because there may be a difference between the two, I don't know.* (Emphasis not in original.)

P. 56 l. 9 to l. 25

MR. CASSIDY: Is it possible for you to just write plaintiff individually dismissed so that we have on order to deal with? I would appreciate it, Judge.

THE COURT: Further ordered the plaintiff's complaint shall not be dismissed, however, *J.M. as an individual does not have standing to prosecute the action.* Good enough?

MR. CASSIDY: Okay, then I would ask you to specifically *appoint him as guardian ad litem to prosecute on the action on behalf of the infant. (Emphasis not in original.)*

THE COURT: *I can only write so much. I will do that. I said I would probably do it. I'll say now that effectively the caption* is going to read J.M. as guardian ad litem. (Emphasis not in original.)

MR. CASSIDY: I'll submit a separate order.

THE COURT: If you want to clean it up and make it look nicer, that's okay.

PORTION OF BRIEF OF J.M. FILED IN NEW JERSEY SUPREME COURT ON MOTION FOR LEAVE TO FILE OVERLENGTH BRIEF ON APPEAL TO THAT COURT

ARGUMENT

INTRODUCTION

. . . In reply to V.C.'s opposition to J.M.'s motion for leave to file the brief already lodged with the Court, J.M. observes:

> [1] First, it is impossible for V.C. or anyone else, especially the people of the State, to say precisely what issue or issues were decided by this Court on March 24, 1992 when the child's complaint was dismissed;
>
> [2] The father's rights are separate from those of the child and include his right to act as guardian and his standing to prosecute the child's action [which implicates the question of whether there is a child in fact, and which of the child's rights he may prosecute];
>
> [3] If there are some issues which overlap with those decided in the child's case, neither the doctrine of res adjudicata nor collateral estoppel bar J.M. from litigating them;
>
> [4] Even if, under normal circumstances a bar to relitigation existed (which it does not), the Court must permit J.M.'s litigation of the issue because (a) the issues are of such public importance that a decision must be reached for the guidance of the legislature, the Courts and resolution of the public interest, and (b) the Court, perhaps because of the special circumstances on March 24, 1992, never issued an opinion which addressed any issue in a substantive way which provided that guidance (so that an opinion in this case does not duplicate anything the Court has already written); and
>
> [5] V.C.'s personal position at this time is not inconvenienced, compromised or prejudiced, so all the issues raised by J.M.'s individual appeal is not only appropriate, but probably constitutes the only effective means for the New Jersey Supreme Court to ever have an opportunity to substantively rule on these important public issues in the context of a civil case.

For each of these separate reasons, and for all of them collectively, J.M.'s motion for leave to file an overlength brief should be granted. J.M. requests that the Court refer to the brief on the merits in determining this motion.

POINT I

J.M.'S INDIVIDUAL RIGHTS WERE NOT PREVIOUSLY ADDRESSED BY THIS COURT, INCLUDING HIS RIGHT TO ACT AS GUARDIAN AD LITEM, AND HIS STANDING TO PROSECUTE HIS CHILD'S CASE. THE COURT CLEARLY DID NOT ADDRESS THE QUESTION OF WHETHER A CHILD IN FACT EXISTED, OR WHICH OF THE CHILD'S RIGHTS J.M. HAD STANDING TO PROSECUTE. IN ADDITION, NEITHER V.C.'S ATTORNEYS NOR THE PUBLIC CAN KNOW WHICH ISSUE WAS DECIDED BY THE COURT IN THE CHILD'S CASE ON MARCH 24, 1992 THAT COULD FORM THE BASIS FOR V.C.'S PRECLUSION ARGUMENT.

V.C.'s attorneys argue that the plaintiff should not be granted leave to file his overlength brief because, they contend, that J.M.'s individual claim includes issues which the Supreme Court of New Jersey decided in the child's case. See Db 8-3 to 4. A brief reply is necessary to clarify that [1] the father's issues are separate, largely different, and previously undecided; and [2] to the extent there may be some issue or issues that overlap, neither V.C. nor the public could possibly know which issue, the reasoning of the Court, or whether it applies to J.M.'s individual claim.

Firstly, J.M.'s individual state and federal constitutional rights have never been decided by this Court. He raised five separate rights each of which can only be determined in conjunction with the question of whether the child is a human being prior to birth [from conception or otherwise]: his right to defend the life of his child, his right to companionship with the child, his right

to discharge his obligations to his child, and his right to equal protection of the laws. In addition, as part of these rights (and as part of the child's rights) he possesses the rights to be the guardian ad litem of his child before birth and to have the standing to prosecute the child's action. All of these rights were raised with the Chancery Division and all of them were dismissed by that Court. The legal argument concerning each of them is contained in J.M.'s brief on the merits lodged with the Court which is the subject of this motion. These issues are important to the public interest, are complex in nature and require the space devoted to them for their substantive development.

The New Jersey Supreme Court clearly did not reach a decision concerning the existence of the child in this context. The Court specifically declined to address the question. See, Order, Pa. 71. Whether this is a child, a human being relates to J.M.'s individual rights including his right to defend the child's life.[10] It also relates directly to the questions of whether he has the right to act as guardian ad litem, and has standing to prosecute the child's rights. The scientific material contained in the brief directly relates to each of the rights of J.M.

The only issues of potential overlap with the Order of March

[10] This after all, is the basis for a state to prohibit abortion after viability. The state has an interest under *Roe* to protect "life" or "potential life". In *Roe* the U.S. Supreme Court recognized that the state could raise the issue of the child's individual rights. Whether a father has an interest to protect the life of his child is an issue here, where the state fails to act. Like a state with a valid interest, the father, if this is a child, has an interest to raise the child's right.

24, 1992 concern the question of whether the child has state or federal rights prior to birth and if so which of these rights does J.M. have standing to prosecute.

Clearly, neither V.C.'s attorney nor the public can possible determine which issue was decisive on March 24, 1992 in the child's case and therefore there is no sound basis for her preclusion argument (inappropriate at this juncture).

Firstly, V.C. cannot say whether the Court determined the child's case on state or federal grounds, since the court did explain any reasoning or cite specific authority. Clearly some of J.M.'s rights involve federal issues which supersede the state, but other state issues are unaffected by the federal ones. J.M. is entitled to litigate the question of which of the child's rights he has a right to litigate. A res adjudicata or collateral estoppel argument requires a definitive statement of the court as a basis for it. Although some issues presented in J.M.'s individual case are the same as some which were argued to the Court on the child's case, the circumstances that existed prevented the litigant from obtaining, and the court providing, a full and complete determination of the issues. See, *Zoneraich v. Overlook*, 212 N.J.Su. 83, 94, 95 (App. Div. 1986).

POINT II

EVEN IF THERE ARE ANY ISSUES IN J.M.'S INDIVIDUAL CASE WHICH OVERLAP WITH THOSE OF THE CHILD (IF THEY CAN BE IDENTIFIED), NEITHER THE DOCTRINES OF RES ADJUDICATA NOR COLLATERAL ESTOPPEL BAR J.M. INDIVIDUALLY FROM ARGUING THE ISSUES AS THEY RELATE TO HIS OWN RIGHTS. THE PUBLIC IMPORTANCE OF THE ISSUES REQUIRE ANY BAR TO THE PLAINTIFF THAT WOULD OTHERWISE EXIST TO BE RELAXED. IN ADDITION, THE PROCEDURE EMPLOYED IN THIS CASE IS PROBABLY THE ONLY

EFFECTIVE MEANS FOR THE NEW JERSEY SUPREME COURT TO EVER REVIEW THE ISSUES PRESENTED BY THIS CASE AND THE SITUATION COULD BE REPEATED YET EVADE REVIEW.

1.

Although the defendant doesn't articulate her argument as one of res adjudicata or collateral estoppel, and cites no authority which supports a bar to J.M. individually litigating the issues presented in his brief, the tone or character of her argument requires a brief comment on why those doctrines do not apply to this case.

In theory, the only issues which could overlap between the two cases concerns the precise right of the child or mother which determine the outcome of the child's case, although none were identified by the Court on March 24, 1992. As a general proposition, adjudication of an issue or claim does not, by operation of res adjudicata or collateral estoppel, bar a person not a party or privy to a party to the prior action from seeking another adjudication of the issue or claim because every person is entitled to his day in court. *Brunetti v. New Milford*, 68 N.J. 576, 587(1975); *Bd. of Directors, Ajax, etc. v. First Nat'l. Bank of Princeton*, 33 N.J. 456, 463(1960); *Lehigh Zinc and Iron Co. v. N.J. Zinc and Iron Co.*, 55 N.J.L. 350, 357 (E&A 1883); *Biddle v. Biddle*, 166 N.J.Su. 1, 5 (App. Div. 1979). J.M. is a separate individual from his child with a separate interest. In order for him to litigate his own interests, the child's rights must be argued and decided. For example, when *Roe* was litigated the U.S. Supreme Court recognized the right of the State of Texas to raise the rights of the child,

Supreme Court, U.S.
FILED
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No. 92-1934

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

J.M., INDIVIDUALLY,
Petitioner,

- against -

V.C.,
Respondent.

On Petition for a Writ of Certiorari
To the Supreme Court of New Jersey

PETITIONER'S REPLY BRIEF TO RESPONDENT'S OPPOSITION

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V.C.'s arguments on jurisdiction, the procedural posture of the case, and her response to the reasons why certiorari should be granted, taken together, amplify the reasons why the writ should be granted: the prior case law simply bears no relevance to the substantive issues of when life begins and whether a child possesses rights prior to birth based upon the child's personal interest in life. The non-responsive nature of V.C.'s brief reflects the fact that the "state's rights" genre of cases (now arguably exhaustive on questions concerning a woman's privacy interest when examined independently of the child's rights) never decided the issues presented by this case. Yet, their resolution is necessary to achieve justice and repose in the law. This case is the best opportunity for this Court to resolve them.

JURISDICTION

A. STANDING

1.

V.C. argues J.M. lacks "standing" to prosecute his child's rights because the child has not been previously given the legal status of "person" (Res. Br. at p. 1-3). This proposition and all the cases cited by V.C. are based upon the *Roe* Court's inability to determine when life begins. These cases simply reflect that this Court hasn't *yet* determined whether or not there exists a human being to have rights. Because the legal rights of the child have

never been examined in the context of the child's established existence and personal interest in life, the cases V.C. cited have no application. These cases hold that *nobody*[1] can have standing because a child is not known to exist - the very question that this case seeks to resolve. The cases have no application when it is established that the second person, the child, exists. (see Pet. at p. 12-18).[2]

2.

J.M. seeks review of his own individual rights, including his right to defend the life of his child, and to be the party to prosecute his child's interests as part of his own parental rights. The standing issue is implicated in both J.M.'s individual rights (as part of his parental rights to prosecute the child's claim) and the child's rights. The fact of the child's existence and the nature of the child's rights are integral elements of the standing issue in both sets of rights, because standing requires a determination of a suf-

[1] None of the cases cited involve a father as plaintiff in a civil suit litigating the child's best interests.

[2] To say, as V.C. does, that no one can have standing to prosecute the child's rights, because the child has not yet been recognized, is to argue that this court can never review the question in the first place. For the Court to determine whether the child possesses rights prior to birth the Court must recognize standing in someone, and the natural father has the greatest relationship with the child for that purpose (Pet. at p. 54-60).

ficient nexus between the litigant and the individual rights he seeks to raise.[3] See e.g., *Griswold v. Connecticut*, 381 U.S. 479, 481 (a doctor could raise the rights of a patient).[4]

"Standing" is an element of the "adverse parties" requirement of Article III and concerns whether the party seeking relief has:

> Alleged such a personal status in the outcome of the controversy as to assure that concrete adverseness which sharpens the preservation of issues upon which the court so largely depends for illumination of difficult constitutional question. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

The standing issue inextricably connects the rights of both father and child, because it relates to the harm each shall endure, and embodies the right each separately possesses to have the father stand in place of the child. When a father seeks to prevent the death of his child there can be little doubt there is a concrete adverseness to those he opposes. If V.C.'s argument were to be accepted, then, in New Jersey, where the state authorizes terminat-

[3] On this Petition V.C. has not directly contradicted the scientific and medical facts which establish that the child is a human being, and that the child experiences pain prior to birth. The New Jersey Courts did not make a finding of fact adverse to J.M.'s position. For the purposes of this petition this Court must resolve all factual inferences in favor of J.M.

[4] e.g. see also, *Truax v. Raich*, 239 U.S. 33 (an employee may assert the rights of his employer); *Pierce v. Society of Sisters*, 268 U.S. 510 (the owners of private schools could assert the rights of potential pupils and their parents); and *Barrows v. Jackson*, 346 U.S. 249 (a white defendant, party to a racially restrictive covenant, could raise the rights of prospective negro purchasers, although no negro was a party to the suit); see Pet. at p. 54-60.

ing the child's life even after "viability", the child would lose his or her life for lack of access to court based on the cruel fiction that neither the child nor the child's father has a sufficient interest in a father defending the child's life. If the absurdity of this pretense is not manifest, it can at least be said that such a result is completely inconsistent with this Court's prior opinions on the subject.

This Court has often recognized the standing of a litigant to prosecute the rights of another if the litigant demonstrates: [1] a degree of injury to himself, and [2] that, under the circumstances present, the injured parties whom they seek to represent would probably be unable to assert their own rights. See e.g., *Barrows v. Jackson*, 346 U.S. 249 (1953); *Buchanan v. Warley*, 245 U.S. 60 (1917); *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Planned Parenthood v. Danforth*, 428 U.S. 52, 62 (1976); *Craig v. Boren*, 429 U.S. 190, 192-197 (1976); *Carey v. Population Services Intl.*, 431 U.S. 678, 682-684 (1977); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). This requirement was expressly stated by Justice Blackmun in *Singleton v. Wolff*, 428 U.S. 106, 112 (1976). The second of these requirements is obviously satisfied, since the child's rights could not be litigated unless someone other than the child is extended standing.

The first requirement, the harm to J.M., is equally clear and directly related to his child's loss. A parent's loss of his child's life (and the destruction of his own rights to defend his child, maintain a relationship with his child, procreate, equal protection, and to discharge his duties to his child) is a harm to him of a greater magnitude than loss of money (e.g. *Singleton v. Wolff, supra.*); subjection to money damages (*Barrows v. Jackson, supra.*); expulsion from a private club (*Sullivan v. Little Hunting Park, supra.*); compulsion to convey property (*Buchanan v. Warley, supra.*); or potential exposure to criminal charges for conduct voluntarily engaged in to earn money (*Doe v. Bolton*, 410 U.S. 179, 188-189 (1973)). If this Court recognizes the standing of doctors who seek to assist in terminating the life of children, then clearly the Court, by the same principles of law, must recognize the standing of a father who seeks to save his child's life.

B. STATE ACTION

When J.M. filed his complaint on March 9, 1992 he sought to litigate his child's best interests, a function served by New Jersey Courts on a daily basis. New Jersey resolves disputes between two parents, who have conflicting plans for their child, based upon the child's best interests. See *Fontany v. Fontany*, 122 A.2d 593 (1956). V.C. claimed that she had a constitutional right

to take the child's life regardless of New Jersey law. Obviously the New Jersey court and this Court have the jurisdiction to determine if she has a right, despite the child's rights, of the nature and scope she claims.

J.M.'s contentions, that the child is a human being, who experiences pain, and who has rights, are relevant to determine the magnitude and scope of V.C.'s rights. V.C.'s rights can only be determined by examining the facts and the competing interests of the child and father. Because the trial judge correctly recognized that the case presented issues never before decided, he entered an injunction. In fact, when V.C. appealed the action of the court, she did not claim that there was no "state action." To the contrary, she argued that the court orders constituted state action and argued, therefore, that her constitutional rights were violated.[5] Under the circumstances of this case, the original order of the court constituted direct state action and the court was required to consider the rights of all of the parties.

The very existence, nature and scope of the right V.C. claims is the very matter for the Court to determine in this case. She conceded that the State Supreme Court had the jurisdiction to de-

[5] See Res. Br. where she admits that the Order of the Chancery Judge constitutes state action. Res. Br. at 11, text and n. 7.

termine the issue. Surely this Court has the power to determine if the State Court was correct in its interpretation of the Fourteenth Amendment. It violates reason to suggest that New Jersey and this court must enforce her claimed constitutional "right" to abortion, but both are powerless to decide if she even has such a right.

Even if the orders of the New Jersey courts did not constitute a direct act of the state, there was significant state involvement in V.C.'s conduct which impermissibly aided it. *Robinson v. Florida*, 378 U.S. 153 (1964); *NCAA v. Tarkanian*, 488 U.S. 179 (1988); *Shelly v. Kraemer*, 334 U.S. 1 (1948). The question is whether the state "puts its own weight on the side of the offending conduct." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351-358 (1974).

In the present case the acts of New Jersey - those of its judicial, legislative and executive branches, separately and in combination - not only encouraged or aided V.C.'s conduct, but V.C. probably could not have taken the child's life without the state's aid. New Jersey: [1] created a legal framework governing the conduct of a mother to take her child's life; [2] directly involved itself in the termination of the child's life through the executive branch; and [3] its court advanced her goal of taking the child's life.

(a) Involvement of the Court.

Where a state's court order assists or advances the offensive private conduct, the involvement of the court constitutes "state action." *Shelley v. Kraemer*, 334 U.S. 1 (1948). This Court observed in *New York Times v. Sullivan*, 376 U.S. 254 (1964):

> Although this is a civil law suit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms...It matters not that that law has been applied in a civil action and that it is common law only...The test is not the form in which state power has been applied, but, whatever the form, whether such power has in fact been exercised. *Id.* at 265.

In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), a lawsuit between private parties, the Court held the application of state rules which restrict constitutional rights constitutes "state action" under the Fourteenth Amendment. Id. 916n. 51. In the J.M. case, once the complaint was filed with the Court, it was, as in *Sullivan* and *Claiborne*, bound to consider the constitutional rights of all the parties.

Five factors in this case reinforce the conclusion that the acts of the New Jersey courts operated to sufficiently involve the state in V.C.'s conduct to constitute "state action." First, the trial court entered an injunction, clearly constituting state action. *Shelly v.*

Kraemer, supra.[6] Once a state does take action, it must do so without violating the constitutional rights of the litigants. When the New Jersey courts were asked to vacate the injunction of the lower court, its subsequent order would bring the painful death of the child under the sanction of the law. New Jersey, before reviewing the Court order enjoining the abortion, was therefore required to consider the rights of the child and the father, and its order was the equivalent of those in *Shelly* and *Sullivan*. The court sanctioned the killing of the child, without considering the rights of child and father. Second, the very life of the child was at stake. Unlike other rights, no redress of grievance could compensate for the impending loss. The Right to Live is unique and the state as the protector of public welfare and safety had a unique and affirmative duty to protect life when requested, *Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson,* 201 A.2d 537 (1964), especially when a court is being asked to *remove* an injunction. The dismissal of the complaint and removal of the injunction surely placed the State's imprimatur on the act of taking the life of this child. see, *Blum v. Yartesky*, 457 U.S. 991, 1003 (1982). Third, the act of

[6] The irony of V.C.'s argument is that she recognizes that an order which interferes with her perceived rights is "state action," but fails to recognize that an order which interferes with the child's rights is state action (see Res.Br. at p. 11).

the private citizen had not yet taken place and could only take place *after* the state acted. This distinguishes those cases where relief is sought after a private citizen has already acted and the state had no real involvement. In fact, V.C. waited to act, and did so only after the Court gave her permission. Fourth, this case does not involve a private entity which sets general policy in a private matter. This case involves a specific, real and present danger to the plaintiff only. Petitioning the court was the only way J.M. could peacefully protect his child. Surely, V.C. does not suggest that J.M. must use force on V.C., the child's life be lost, and he be arrested (in order to have "state action") before he can litigate the interests involved. Finally, the Court, in acting to determine the common law rights of the two parents and the child, where the parents disagreed on the future of the child, exercised its *parens patriae* jurisdiction. Once a court seeks to use its power to determine a dispute, the court itself is subject to the constraints of the equal protection clause, and is required to apply the equal protection of the law to all parties. See, *Kentucky Finance Co. v. Paramount Auto Exchange*, 262 U.S. 544 (1923); *Virginia v. Rives*, 100 U.S. 313 (1880); *Civil Rights Case*, 109 U.S. 3 (1883); *Jersey Shore Medical Center-Fitkin Hospital, et al. v. Estate of Baum*, 84 N.J. 137, 143-145 (1980). New Jersey, therefore, was obliga-

ted to provide equal application of the child's Fourteenth Amendment Rights (and those of J.M.) as well as the New Jersey constitution's rights to life and to defend life. N.J. Const. Art. I, Sec. 1.

(b) Involvement by other Government branches.

New Jersey created the rules of law upon which V.C. relies to violate the rights of J.M. and his child. This Court observed:

> In the typical case raising a state action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the state was sufficiently involved to treat that decisive conduct as state action. *NCAA v. Tarkanian*, 488 U.S. 179, 192 at 192.

In 1978 New Jersey Repealed N.J.S.A. 2A:87-1 which made abortion a high misdemeanor, thereby removing all prohibition against a mother taking the life of her child. New Jersey, in licensing its physicians, specifically gave doctors authority to terminate the life of a child before birth. New Jersey licenses and regulates doctors and hospitals through the Board of Medical Examiners. New Jersey's Administrative Code states that only a physician licensed by the state may perform an abortion. Reg. of Bd. of Med. Exam. 13:35-4.2(b). The regulations affirmatively authorize abortions anytime prior to birth. Even after 20 weeks gestation the only limitation is that the doctor must perform a "D

and E" procedure (always fatal to the child)[7] in a licensed ambulatory care facility and the doctor show proper training. N.J.A.C. 13:35-4.2(g). The state licenses individuals to take the life of a child anytime prior to actual birth.

When New Jersey repealed the anti-abortion statutes, raised (in significant part by direction of the Federal Government) the conduct of abortion to a protected status, and directly authorized the conduct of abortion itself, these actions constituted "state action" because [1] it actively encouraged the conduct which offended the child's rights and those of J.M.; and [2] it immunized the offensive conduct from the ordinary legislative process impermissibly burdening the rights of one class of individuals (children before birth). *Reitman v. Mulkey*, 387 U.S. 369 (1967).

The licensing procedure is itself a significant state involvement in the conduct. This licensing procedure can be distinguished from those found in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) and *Jackson v. Met. Ed. Co.*, 419 U.S. 345, 95 S.Ct. 449 (1974). First, the licenses in *Moose Lodge* and *Jackson* were collateral to the actual conduct complained of. Here, the state specifically licenses the precise act resulting in the harm. The

[7] See, *Planned Par., Kansas City v. Ashcroft*, 462 U.S. 476, 483, 103 S.Ct. 2517, 2521.

license procedure more than simply creates a nexus to an entity or individual, it creates a nexus to the conduct which causes the harm. *Jackson*, at 351. Second, in *Moose Lodge* and *Jackson* the private actors performed functions that were outside the functions of the state. Here, it is the specific function of the state to protect the lives of its citizens and to judge if taking a human life is justified. The state, therefore, by giving *express* license to take the lives of children, dealt with activity which is within the unique function of the state.

THE STATEMENT OF THE CASE

A. PROCEDURAL MATTERS

J.M.'s individual case was not the subject of a final order of the New Jersey Supreme Court until March 9, 1993. As a result of the New Jersey Courts bifurcating the case, a petition was filed in this Court in 1992. However, this is the first petition before the Court from an order of the New Jersey Supreme Court which is complete and final on all issues under 28 U.S.C. §1257. *Market Street R. Co. v. Railroad Comm'n*, 324 U.S. 548, 541 (1945); *North Dakota Pharmacy Board v. Snyder's Tows*, 414 U.S. 156, 159 (1973); *Grovey v. Townsend*, 295 U.S. 45, 47 (1935); *Barton v. Maryland*, 395 U.S. 784, 786 (1969). V.C. does not, nor could she, maintain that the filing of a petition in this Court in 1992

operates to deprive the Court of jurisdiction on this petition. Indeed, in 1992 V.C. argued to this Court that it could not review a petition in this case until J.M.'s individual case was finalized and this particular petition was filed (see portion of Brf. of V.C. filed with this Court in 1992 at A-212 to A-217). At that time, V.C. argued that J.M.'s individual claim pending in the Appellate Division of the Superior Court of New Jersey "bars review of petitioner's claim in this Court." (A-214 to A-215).

This is therefore the proper time for a complete review of all of the issues presented in this case, both those relating to J.M.'s individual rights as well as the rights of the child. The New Jersey Supreme Court's treatment of the father's case and the child's case separately could be interpreted as an implied affirmance by that Court that it was dealing with two separate individuals. Nonetheless, all issues arising out of the original case are now before the Court. The petition filed last year on behalf of the child cannot operate to preclude review of any issue now because: [1] all of the issues are present in J.M.'s individual case; and [2] such a ruling would, by necessity, require a holding that the child was a complete, separate individual human being who exhausted all of his or her remedies. To so hold the Court would have had to expressly make such a legal ruling, or must do so now. Such a ruling would

now support the Court granting certiorari in J.M.'s individual case. The alternative implied ruling was the the child lacked capacity to litigate. Whether or not this Court could have in its discretion exercised jurisdiction in 1992, in its discretion, the case is clearly and properly before the Court now. In fact, this is the only opportunity this Court has to review the entire case after the final order of the New Jersey Supreme Court and it presents all of the issues in both the child's case and that of J.M.

Contrary to V.C.'s incorrect assertions, J.M. was never appointed Guardian Ad Litem in this case. No decision to appoint him was reached and no order was entered. Likewise, the original injunction entered on March 9, 1992 was not *ex parte* but on notice to V.C. and W.M.C. (the co-defendant).[8]

B. THE RECORD ON THE SCIENTIFIC AND MEDICAL FACTS.

The statement of V.C.'s attorneys that the scientific evidence is not part of the record in the state court is simply false. See, Res.Br. p. 9, text and n.4. When this case was commenced on March 9, 1992 the petitioner argued that day, and provided certifications to the court, that recent scientific and technological

[8] The court record, although the transcript was never obtained, would reveal that W.M.C. advised the Court it would not appear that day, and the Court entered the injunction against V.C. only after the Court was satisfied that notice requirements were met.

advances show that [1] the life of a child begins at conception; and [2] the child experiences pain as early as eight weeks after conception (see certifications filed with the trial court at A-106 to A-136). After petitioner filed his appeal as of right, the Appellate Division granted J.M. leave to supplement the record with a brief containing extensive scientific and medical citations and discussion (order at A-186). V.C. attempted and failed to convince the New Jersey Supreme Court to exclude the scientific and medical citations and argument. On December 8, 1992 that court, over V.C.'s strenuous argument, granted leave to J.M. to file a brief containing the latest scientific and medical evidence [order at A-218; portions of brief pursuant to leave of court at A-304 to A-358].

Although a fact question, no state can bind this Court on the question of when life begins because of its implications for the Federal Constitutional questions. The fact that this case comes to the Court with a record preserved on the question but without a state court's preconceived finding is one of its procedural strengths. This Court can make its own determination free of a biased record, and can do so in any manner the Court deems just, either by special briefing, a specially defined remand, or any procedure designed to arrive at the truth.

WHY PETITION SHOULD BE GRANTED.

A.

In this case the respondent has not made a serious attempt to rebut the scientific fact that the child whose life was terminated was a human being able to experience pain. Instead, she argues that it is irrelevant that abortion is the intended and unjustified taking of the life of a human being who experiences pain. Worse, V.C. attributes these sentiments to this Court. To underscore her argument that it is this Court which finds these facts irrelevant, V.C. has filed a motion to personally sanction J.M. and his counsel because, she argues, J.M.'s presentation of these facts, and the rights of the child, to the Court is "frivolous". There can be little doubt that denial of J.M.'s petition under these circumstances may be interpreted by other courts, and the public, as this Court's finding the intended and painful termination of the life of a human being as irrelevant to justice. In fact, this Court has never determined when life begins, and never stated that it was irrelevant.[9]

B.

The arguments of V.C. as to why this Court should not grant certiorari rest in the final analysis upon one common element: that this Court has already ruled that a woman's privacy interest, bal-

[9] Justice Stephens has specifically referred to the ability of the child to experience pain as a relevant fact. *Webster v. Reproductive Health Services*, 109 S.Ct. 3040, 3084, Stephens, J., concurring in part and dissenting in part.

anced against the state' interest in "potential life" supports a broad abortion right. V.C. simply ignores the entire point of J.M.'s argument. All of the prior case law she cites deals exclusively with balancing a mother's interest against that of the state - an interest described as a generalized interest in the potential life. J.M. litigates the personal and real interest his child has in actual life. Nowhere in the case law has this Court balanced the child's interest in life with the identified interests of the child's mother. The interest of the state identified in *Roe v. Wade*, 410 U.S. 113 (1973) was described as merely an interest in "potential life." *Roe*, at 159. Likewise, in *Planned Parenthood of Central Missouri et al v. Danforth*, 428 U.S. 52 (1976), the majority addressed only the *state's interests*, never the personal interests of the child, when it examined only the state's ability to delegate the *state's interest* to a husband:

> ...[t]he state cannot "delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy." [cite omitted]. Clearly, ...the state cannot delegate authority to any particular person, even the spouse, to prevent abortion during that same period. *Danforth*, at 69.

Likewise, in *Planned Parenthood v. Casey*, 505 U.S. ___, 112 S.Ct. 2791 (1992) the Court only addressed the state's interest. Consequently, the Court's entire analysis concerning "spousal con-

sent" did not involve the child's interest in life, but only the right of one spouse imposing a decision upon the other. *Casey*, 112 S.Ct. at 2826-2831. Whether or not this Court can be said to have truly addressed a father's interest in the life of his child, the Court has clearly never addressed the child's personal interest in life.

V.C. also misinterprets the point of the state's *parens patriae* jurisdiction. If the child is in fact a human being, then the character of the state's interest must be described differently than it has been to date, because once the humanity of the child is recognized, the state's interest is clearly that of its *parens patriae* jurisdiction, one protecting the actual life of the child. The point of *Snapp v. Puerto Rico*, 458 U.S. 592 (1982) is that once the state's *parens patriae* jurisdiction is identified as the true interest of the state, then it is clear the child must have a personalized interest in life as well. *Snapp* at 600 n. 8.

C.

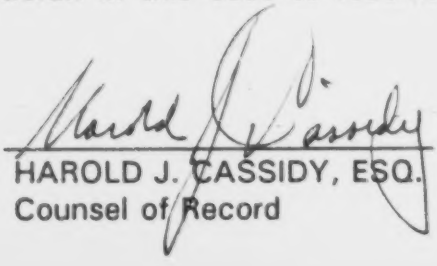
This case should be reviewed by this Court because, among other reasons, it presents questions of first impression only this Court can decide, and until the question of the child's interest in life is addressed by the Court the law of abortion will always remain unresolved. *Casey* may have resolved the legal question of a

woman's interests balanced against those of the state, but the interests of a mother remain examined in a vacuum until they are balanced against the child's interest in life. Until this Court answers the question specifically reserved by *Roe* - when does the life of the child begin - it can never be credibly asserted that it has finally decided the abortion question.

More importantly, this case and the issues it presents confront us with a most profound, yet fundamental, question of justice. How can a state like New Jersey authorize the painful dismemberment and death of children before and after the age of viability without our ever permitting the child's parent to speak for the child by litigating the child's right to live? J.M. urges this Court to rule on the question of the child's humanity, the right of a parent to litigate the child's rights, and the limits on government to decide which persons' lives have no value.

CONCLUSION

V.C.'s brief fails to address the real issues of this case. Justice requires that this Court grant certiorari in this case to resolve them.



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Supreme Court of the United States

OCTOBER TERM, 1992

J.M., INDIVIDUALLY,
Petitioner,

- against -

V.C.,
Respondent.

On Petition for a Writ of Certiorari
To the Supreme Court of New Jersey

PETITIONER'S REPLY BRIEF TO RESPONDENT'S OPPOSITION TO MOTIONS FOR LEAVE TO FILE AMICI CURIAE BRIEFS

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Petitioner urges that the three motions submitted by the ninety-two amici curiae be granted.[1] The arguments contained in the three concise briefs are quite pertinent to whether the petition should be granted and are the type of amici briefs which are helpful to this court.

The brief submitted by The World Federation of Doctors Who Respect Human Life and seventeen other amici[2] includes substantial and persuasive authority that demonstrates that the life of a human being begins at conception and a child experiences pain as early as eight weeks after conception. The brief submitted by the University Faculty for Life, and twenty-two other amici[3]

[1] Combined, these amici represent millions of individuals.

[2] American Academy of Medical Ethics; American Life League, Inc.; Canadian Physicians for Life; Catholic Association of Scientists and Engineers; Dentists for Life; International Right to Life Federation; Life Issues Institute, Inc.; National Association of Pro-Life Nurses; National Federation of Catholic Physicians' Guilds; Pharmacists for Life; Philadelphia Catholic Physicians Guild; Philippine Association of Family Physicians in America; Scientists for Life; The Guild of St. Luke, S.S. Cosmas & Damian; and New Zealand Doctors for Life

[3] American Association of Pro Life Obstetricians and Gynecologists, Christian Life Commission of the South Baptist convention, Holston Baptist Association, Libertarians for Life, National Federation of Catholic Physicians Guild, Professor Anthony Andres, Rev. Benedict Ashley, James J. Carberry Ph.D., Prof. William F. Colliton, Jr., M.D., F.A.C.O.G., Professor John M. Finnis, F.B.A., Rev. John F. Harvey, Professor Dianne N. Irving, Ph.D., Mr. Brendan Kelley, Professor C. Ward Kischer, Ph.D., Hanna Klaus, M.D., F.A.C.O.G., Professor Douglas W. Kmiec, J.D., Professor William E. May, Ph.D., Professor Ralph McInerney Ph.D., Edmund

address scientific and philosophical considerations which demonstrates the relevance of the scientific facts to the legal issue of whether the child has rights prior to birth. The brief submitted by Concerned Women of America, and fifty other amici[4] addresses the fact that the question of when life begins has never been decided by this court, that it was specifically reserved by the *Roe* Court for a subsequent court, and that principles of *stare decisis* do not preclude this Court from deciding the substantive issues this case presents.

D. Pellegrino, M.D., Professor Charles Rice, J.D., Edward Sheridan, M.D., F.A.P.A., and Prof. Richard Stith, J.D., Ph.D.

[4] Feminists for Life of America; National Council of Catholic Women; American Family Association, Inc.; International Black Women's Network; Family of the Americas; American Center for Law and Justice; Free Speech Advocates; Coalitions for America; Abortion's Aftermath; American Rights Coalition, Inc.; Catholic Women's League of New Zealand Incorporated; Femcare; Institute for Pregnancy Loss; National Office of Post-Abortion Reconciliation and Healing; Open Arms; Pregnancy Counselling Services Incorporated; Professional Women's Network; Victims of Abortion New Zealand Incorporated; Victims of Choice; Women Affirming Life; Women Exploited by Abortion; Women for Faith and Family; Women for Life; Women for Women; Accion Familiar; Alliance for Life; Apostolatus Unite; Centro de Investigacion y Docencia; Christian Advocates Serving Evangelism; Delaware Lawyers for Life; Delaware Right to Life; Family and Youth Concern; Family Protection Lobby; Facultad de Medicina; Human Life Foundation of New Zealand; Human Life International; Instituto de Ciencias Familiares; Knights of the Southern Cross; March for Life; March for Life Education and Defense Fund; National Institute of Family and Life Advocates; New Zealand Society for the Protection of the Unborn Child Incorporated; Pro-Life Action League; Right to Life League of Southern California; Rockland County Catholic Coalition; Scottish Assocation for Natural Family Planning; Service and Research Foundation of Asia on Family and Culture; Society for the Protection of Unborn Children; Society of St. Vincent de Paul in New Zealand; and World Organization for the Family

All of the amici briefs are pertinent and helpful to this court in deciding whether to grant certiorari. Although the consent of counsel is customarily preferred by the court before the court entertains an amicus curiae brief, in a rare instance where one litigant unreasonably withholds consent, and the issues are of such significant public importance, the public interest must outweigh the personal preferences of the litigant and the motion should be granted.

It is significant that the only reason that respondent argues for denial of the motion is that respondent again states she fails to see the "relevance" of the facts and that this Court has never ruled on these issues. That failure should not bind or guide this nations highest Court.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

Supreme Court, U.S.
FILED
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J.M., Individually,

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V.C., *et al.*,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF UNIVERSITY FACULTY FOR LIFE, AMERICAN ASSOCIATION OF PRO LIFE OBSTETRICIANS AND GYNECOLOGISTS, CHRISTIAN LIFE COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, HOLSTON BAPTIST ASSOCIATION, LIBERTARIANS FOR LIFE, NATIONAL FEDERATION OF CATHOLIC PHYSICIANS GUILD, PROFESSOR ANTHONY ANDRES, REV. BENEDICT ASHLEY, JAMES J. CARBERRY PH.D., PROF. WILLIAM F. COLLITON, JR., M.D., F.A.C.O.G., PROFESSOR JOHN M. FINNIS, F.B.A., REV. JOHN F. HARVEY, PROFESSOR DIANNE N. IRVING, PH.D., MR. BRENDAN KELLEY, PROFESSOR C. WARD KISCHER, PH.D., HANNA KLAUS, M.D., F.A.C.O.G., PROFESSOR DOUGLAS W. KMIEC, J.D., PROFESSOR WILLIAM E. MAY, PH.D., PROFESSOR RALPH McINERNEY PH.D., EDMUND D. PELLEGRINO, M.D., PROFESSOR CHARLES RICE, J.D., EDWARD SHERIDAN, M.D., F.A.P.A., PROF. RICHARD STITH, J.D., PH.D. IN SUPPORT OF PETITIONER

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On Petition for Writ of Certiorari to the Supreme Court of New Jersey

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

University Faculty for Life and other amici hereby move, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amici curiae*. Counsel for the petitioner has consented to the filing of this brief; counsel for the respondents has refused consent.

University Faculty for Life (UFL), founded in 1989, is a nondenominational organization of more than 400 faculty members from 80 colleges and universities in the United States. UFL seeks to ensure that public policy on abortion is grounded on current and reliable scientific, medical, philosophical and other scholarly information. UFL favors human life, disfavors abortion and requests that the Court grant J.M.'s Petition for Certiorari so that the Court can consider the medical and scientific consensus that now exists on when the life of a human being begins.

The American Association of Pro-Life Obstetricians and Gynecologists is an organization dedicated to protect-

ing and preserving human life at all stages. David J. Martin, M.D., LTD. of St. Louis, Missouri, is President of the Association.

The Christian Life Commission is the moral concerns and public policy agency for the Southern Baptist Convention, the nation's largest Protestant denomination, with over 15.4 million members. The Commission is charged with addressing public policies affecting the sanctity of human life, the integrity of marriage and the family. The Southern Baptist Convention's members are overwhelmingly opposed to abortion. On behalf of the members, the Commission requests this Court to reconsider the issue of when the life of a human being begins. This issue was left undecided in *Roe v. Wade.*

The Holston Baptist Association represents over 35,000 Baptists in northern Tennessee, and seeks to give leadership and direction for a common voice in matters of social concern, including the rights of the pre-born.

Because Libertarians for Life oppose government encroachments, National Co-ordinator Doris Gordon of Wheaton, Maryland, hereby requests this Court to reconsider when a human being begins life.

National Federation of Catholic Physicians Guilds, Elm Grove, Wisconsin, is comprised of Catholic Physicians Guilds across the United States. Providing skill and experience in the medical field it promotes medical ethics and supports the view that the life of each individual begins at conception. George Isajiw, M.D., is president of the Guilds.

Professor Anthony Andres, Ph.D., is professor of philosophy at Christendom College, Front Royal, Virginia.

Rev. Benedict Ashley, O.P., professor of moral theology and medical ethics, represents the Pope John XXIII Medical Moral Research and Education Center, Braintree, Massachusetts.

James J. Carberry, Ph.D., is professor of chemical engineering at the University of Notre Dame, Notre Dame, Indiana.

William F. Colliton, Jr., M.D., F.A.C.O.G., is Clinical Professor of Obstetrics and Gynecology at the George Washington University Medical Center, Washington, D.C.

Professor John M. Finnis, F.B.A., is professor of law and philosophy at University College, University of Oxford, England.

Rev. John F. Harvey, O.S.F.S., is director of *Courage*, New York City, New York.

Professor Dianne N. Irving, Ph.D., is professor of philosophy and bioethics at the De Sales School of Theology, Washington, D.C.

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Professor Clayton Ward Kischer, Ph.D., is professor of embryology, College of Medicine, Department of Anatomy, University of Arizona Health Sciences Center, Tucson, Arizona.

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QUESTION PRESENTED

Whether the human *being*, whose life begins at conception as demonstrated by scientific and medical consensus, is also a legally protected *person* from fertilization through adult death.

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INTEREST OF AMICI CURIAE

The University Faculty For Life encourages scholarly research used in public policy on abortion.

SUMMARY OF ARGUMENT

University Faculty for Life (UFL) adopts and supports the position of the Petitioner that there is now a scientific consensus that the life of every human being begins at fertilization. This brief demonstrates that every human *being* is simultaneously a human *person* from the moment of *fertilization*. No real valid scientific or philosophical distinction can be made between a human being and a human person after fertilization. Arguments for "personhood" at various biological marker events during human embryogenesis or after birth cannot be sustained either scientifically or philosophically.

ARGUMENT

In support of the Petitioner UFL argues here that there is no distinction between a human being and a human person from fertilization on. However, some argue that there is no human person present until the 2-cell, 5-6 day, 14 day, various brain-related ("rational attributes", or sentience), or early childhood stages of human development—and *therefore* no Constitutional rights and protections are due until those developmental stages. UFL argues against such claims and for "personhood" at fertilization, because the accurate scientific evidence and an objectively based philosophy demonstrate this; whereas the arguments for "delayed personhood" are based on inaccurate science, and theoretically and empirically refutable philosophical definitions. The term "human being" is co-extensive with the term "human person" from fertilization on, and *therefore* a human being is due constitutional rights and protections at fertilization.

A. The Correct Science And A Realistic Philosophy Demonstrate No Distinction Between A Human Being And a Human Person

First, it is important to understand that our argument is based only on logic, science and philosophy—not on religion or theology.

Second, it is critical for this Court to consider the logical outline and conclusions of the alternative arguments. It is claimed that certain (different) degrees of physiological development are the *physiological preconditions* for the capacities of "rational attributes" or "sentience"—i.e., the preconditions for "personhood". But the specific humanly functioning physiological precondition for all such physiological preconditions is the functioning human zygote itself formed at fertilization. Thus these arguments for "preconditions" fail.

Or it is claimed that a human person should be defined only in terms of the *actual exercising* of either (1) "rational attributes", or of (2) "sentience", or brain integration. However, empirically, the exercise of either full "rational attributes", sentience or brain integration cannot take place until years after birth; and some higher primates are more sentient than normal human infants or young children. Therefore many populations of human beings would *not be persons,* and this Court would be required to permit: the denial of health care or other legal benefits and protections; or their treatment as "animals", e.g., used in experimental medical research or religious sacrifices, or unrestrictedly harvested for organs; or the infanticide of normal healthy human infants and young children. Such human populations would also include: patients with Alzheimer's or Parkinson's disease, multiple sclerosis, the mentally ill, the depressed, alcoholics, drug addicts, the comatose, etc.

Given these critical logical precisions we will proceed with our argument. Accurate scientific evidence demonstrates *unequivocally* that the life of every human being begins at fertilization. Although fertilization is a process, within that process there is a point in time and space when an individual human being begins. The "23" chromosomes of the sperm which are different from the "23" chromosomes of the ovum combine during fertilization to form a human zygote with *"46"* chromosomes. These chromosomes are qualitatively different from either parent,

and are the specific number characteristic of the human species [1] (and not simply of the genus "animal").[2]

Immediately the human zygote produces specifically *human* proteins and enzymes; [3] *no genetic* information is gained or lost; and this genetic information *cascades* throughout embryogenesis.[4] Thus the human zygote ultimately directs and is the cause of virtually *all* of the processes of human development after fertilization, including: [5] molecular information, methylation, cell division, totipotency, differentiation, implantation, formation of the primitive streak, nerve net and full brain integration—and all developmental and growth processes after birth. *Physiologically there is no break or distinction during the entire continuum of human development* (even if there is twinning). Therefore scientifically it is clear that the human zygote formed at fertilization is specifically and characteristically a new real existing individual human being. Even if some human zygotes are spontaneously aborted, such external circumstances do not change the internal "nature" of the human zygote as a human being.

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[1] K.L. Moore, *The Developing Human* (Philadelphia: W.B. Saunders Co., 1982, 3rd ed.), 14ff; B. Lewin, *Genes III* (New York: John Wiley and Sons, 1987), 24ff.

[2] Lewin (1987), ibid., 386-394, 401; A.E.H. Emery, *Elements of Medical Genetics* (New York: Churchill Livingstone, 1993), 93; A. Schniecke et al, "Introduction of the human pro alpha 1(I) collagen gene into pro lapha 1(I)-deficient Mov-13 mouse cells leads to formation of functional mouse-human hybrid type 1 collagen", *Proceedings of the National Academy of Science-USA* 84:3 (Feb. 1987), 764-8.

[3] G. Kollias et al, "The human beta-globulin gene contains a downstream developmental specific enhance, "*Nucleic Acids Research* 15:14 (July 1987), 5739-47; R.K. Humphries et al, "Transfer of human and murine globin-gene sequences into transgenic mice," *American Journal of Human Genetics* 37:2 (1985), 295-310.

[4] Emery (1983), op. cit., 103; Mavilio et al, "Molecular mechanisms of human hemoglobin switching: selective undermethylation and expression of globin genes in embryonic, fetal and adult erythroblasts," *Proceedings of the National Academy of Sciences-USA* 80:22 (1983), 690.

[5] Lewin (1987), op. cit., 681; Emery (1983), op. cit., 93.

There must be a direct relationship between these scientific facts and any objectively based philosophical definition of a "human being" if our philosophical concepts are to accurately reflect reality. Not all philosophical definitions are relative. Some are empirically based; others are not. It is possible to have an *objectively* based philosophical definition of a human being if a realistic method is employed.

A realist philosophy *begins* its deliberations and grounds its concepts and definitions on this accurate science, and *checks back* to it to determine their truth or falsity.[6] If the concepts and definitions correlate with the scientific evidence, then they are true; if not, then they are false. Philosophical definitions use terms which reflect the "*nature*" of a thing, determined empirically by observing the specific and characteristic *kinds of actions and functions* a thing performs. This is the obvious reasoning principle behind any basic scientific research: function follows form.[7] Sodium burns orange, cobalt burns blue—bacteria can only be grown on specific culture medium. Birds can fly, but human beings and gorillas cannot; giraffes can produce "giraffe" proteins, enzymes and embryos; but corn stalks or human beings cannot. This is how things are scientifically categorized into natural *kinds*.

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[6] G. Klubertanz, *Introduction to the Philosophy of Being* (New York: Appleton-Century-Crofs, 1963); E. Gilson, *Being and Some Philosophers* (Toronto: Pontifical Institute of Mediaeval Studies, 1949); D. Irving, "Science, philosophy, theology-and altruism: the *chorismos* and the *zygon*" in H. May, M. Streignitz, P. Hefner (eds.), *Loccumer Protokolle* (Rehburg-Loccum: Evangelische Akademic Loccum, 1992); Irving, "Scientific and philosophical expertise; an evaluation of the arguments on 'personhood'", *Linacre Quarterly* 60:1 (Feb. 1993), 21-22; Irving, "The impact of scientific 'misinformation' on other fields; philosophy, theology, biomedical ethics, public policy", *Accountability in Research* 2:4 (April 1993), 244-249.

[7] Lewin (1987), op. cit., 11-13, 30; Emery (1983), op. cit., 101-103.

Applying this principle, a realist draws from the accurate embryological information to explain and determine what has taken place, and if and when a human being exists. It concludes philosophically from the above scientific facts that at fertilization a *substantial* change (i.e., a change in "natures") has taken place. *Before* fertilization, only a sperm and an ovum exist, which each contain only "23" chromosomes. They cannot produce specifically human enzymes or proteins or functionally develop into a human zygote or human being even if implanted singly in the womb. They must first recombine. *After* fertilization a different "nature" exists—i.e., a human being, and subsequently there is only *accidental* change (i.e., only a change in growth and development).[8] The human zygote now contains "46" chromosomes, produces specifically human enzymes and proteins, tissues and organs, and does not gain or lose any genetic information. Only human growth and development take place —and only through the agency of the genetic and other information ultimately contained in the original human zygote. Thus at fertilization the matter is "appropriately formed"[9]—it is humanly formed and it is functioning and acting humanly. Philosophically we conclude, then, that a *human being* exists after fertilization.

We can also conclude philosophically that the human zygote possesses the *potency*[10] (capacity) to direct its

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[8] H.B. Veatch, *Aristotle: A Contemporary Approach* (Indiana: Indiana University Press, 1974), Chap. 2, 3; G. Klubertanz, *The Philosophy of Human Nature* (New York: Appleton-Century Crofts, 1953, 124ff).

[9] Klubertanz (1953), *ibid.*, 312; B. Ashley, "A critique of the theory of delayed hominization", in D.G. McCarthy and A.S. Moracrewski (eds.), *An Ethical Evaluation of Fetal Experimentation: An Interdisciplinary Study* (St. Louis: Pope John Center, 1976), 113-133.

[10] Aristotle, in R. McKeon (ed.), *The Basic Works of Aristotle* (New York: Random House, 1941), "Metaphysica" (Book Theta) 9.1.10461-9.8.105b, p. 826-831; T. Aquinas, *On Being and Essence*, A. Mauer (trans.) (Toronto: The Pontifical Institute of Mediaeval Studies, 1983), 58, 62-63.

own continuous development. This potency is possessed by an already existing individual human being. Therefore, the human zygote is *not* a "possible" or "potential" human being or human person—i.e., one that does not yet exist—but an *already existing* and *functioning* human being with a potency to *develop* itself further.

But is it a human "person"? Just as the law does not distinguish between a human being and a human person, neither does a realist philosophy. Definitionally there is *no philosophical distinction between a human being and a human person,* because the *terms are co-extensive.*[11] The definition of a human being includes the *entire* complex concrete being—including the characteristic "vegetative" and "sensitive" powers, and the "rational" power of thinking and choosing—as well as the human body. Thus there are no real "splits" among the human powers, nor between those powers and the body. If there are no splits, the entire human being—including all of his or her powers—must be present *simultaneously* when the human being begins, at fertilization.

The human zygote (or embryo or fetus) not only possesses the real and presently existing *capacity* of a human being; it is also *exercising* that capacity by acting in a human—i.e., a "rational"—way. This is confirmed once again by the accurate scientific evidence. If there were only "vegetative" powers present at fertilization, the human zygote would not "know" how to direct the formation of specifically *human* enzymes and proteins—only "vegetative" ones. If there were only "sensitive" or "animal" powers present, the human zygote would not "know" how to direct the formation of specifically *human* tissues

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[11] K. Doran, "Person—a key concept for ethics," *Linacre Quarterly* 56:4 (1989), 39; Aristotle, *De Anima,* in McKeon (1941), op. cit., 1.4.411b, 14-18 and 24-28, p. 554; T. Aquinas, *Summa Theologica,* Fathers of the English Dominican Provence (trans.), (Westminster, MD: Christian Classics, 1981), v. 1, I.a.q.29,a.1, ans., ad. 2,3,4, p. 156; R. Barry, "Self-consciousness and personhood", *Linacre Quarterly* 46:2 (1979).

and organs—only "animal" ones. However, scientifically we observe that specifically *human* proteins and enzymes, tissues and organs are produced from fertilization on.

If the human being is scientifically demonstrated to be present at fertilization; and if specifically human products and organs are formed from fertilization on; and if a human being is realistically defined *inclusive* of all of its powers (which cannot be split from each other or from the body); then all of these powers must be present when the human being is present—at fertilization—including the "rational" power of thinking and choosing.

Thus *there is no scientific or philosophical distinction between a human being and a human person.* A human being who is simultaneouly a human person is present at fertilization, and acting humanly. Since every human being is constitutionally due his or her rights and protections, and since the life of every human being begins at fertilization, then every human being is due those rights and protections from fertilization on—including the unborn child of J.M.

B. Arguments for "Delayed Fetal Personhood" Are Based On Inaccurate Science

Some are currently arguing that "personhood" is only a "social construct",[12] or that even though there is a human *being* present at fertilization, there is no human *person* present until some later biological "marker event" during the continuum of human embryological development. These writers make a *real distinction* between a human being and a human person—and only human persons are due social, ethical or legal rights and protections. The main purpose of this section is to point out the serious scientific discrepancies in the science used in these "delayed fetal personhood" debates.[13] *Different conclu-*

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[12] J.A. Robertson, "Extracorporeal embryos and the abortion debate", *Journal of Contemporary Health Law and Policy* 2:53 (1986), 53-70.

[13] See, e.g., D. Irving, *Philosophical and Scientific Analysis of the Nature of the Early Human Embryo* (Doctoral Dissertation,

sion about "personhood" follow from different sets of scientific evidence. Their arguments are as follows:

Some argue that the early human embryo is only a "blob", a lump of the mother's tissues, and not a human being. Others, e.g., Suarez [14], claim that a human person begins only at the 2-cell stage, *with the completion of the genetic input* of the program "man". However, the human embryo is not a "blob" or a piece of the mother's tissues. The mixture of chromosomes in the human embryo is *unique* for that single embryo and *different* from those in either the mother or the father. The human embryo *is* a human being—as vertified by placing it under a microscope and counting the number of chromosomes—i.e., "46". Finally, at fertilization the *completion* of the genetic input has already taken place at the 1-cell human zygote stage.

Bedate and Cefalo [15] argue that the human zygote is not a person; it is *not specifically human* and does not

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Washington, D.C.: Georgetown University, 1991), see summaries pp. 23, 53, 59, 70, 82, 114, 131, 145, 169, 205, 245, 247, 259; C.W. Kischer, "Human development and reconsideration of ensoulment", *Linacre Quarterly* 60:1 (Feb. 1993), 57-63; J.J. Carberry and D.W. Kmiec, "How law denies science" *Human Life Review* 18:4 (1992), 105; A. Fisher, "Individuogenesis and a recent book by Fr. Norman Ford", *Anthropotes* 2 (1991), 199ff; W.E. May, "Zygotes, embryos, and persons", *Ethics and Medics*, Part I 16:10 (Oct. 1991); B. Ashley, "Delayed hominization: Catholic theological perspectives," *The Interaction of Catholic Bioethics and Secular Society*, R. E. Smith (ed.) (Braintree, MA: The Pope John Center, 1992), 163-180; A. Regan, "The human conceptus and personhood", *Studia Moralis* 30 (1992), 97-127; P. McCullagh, *The Foetus As Transplant Donor: Scientific, Social and Ethical Perspectives* (New York: John Wiley and Sons, 1987); A.A. Howespian, "Who or what are we?", *Review of Metaphysics* 45 (March 1992), 483-502. G. Grisez, "When do people begin?", *Proceedings of the American Catholic Philosophical Association* 63 (1990), 27-47.

[14] A. Suarez, "Hydatidiform moles and teratomas confirm the human identity of the preimplantation embroyo," *Journal of Medicine and Philosophy* 15 (1990); 627-635.

[15] C. Bedate and R. Cefalo, "The zygote: to be or not be a person", *Journal of Medicine and Philosophy* 14:6 (1989), 641; see

contain *"information" about differentiation.* It only contains enough *genetic* information to proceed through the *blastocyst* stage. After that, differentiation and the other processes of embryogenesis depend on *molecular* information from the mother, "information" not present in the zygote. Also, the developing embryo can give rise to biological entities which are *not* human beings, i.e., hydatidiform moles and teratomas. But empirically we know that the human zygote *is* specially human and does *contain and control* all of the genetic information of *all* of the processes of embryogenesis, including differentiation and those processes past the blastocyst stage. Considerable scientific evidence has already been noted demonstrating that specifically *human* enzymes and proteins are produced after fertilization. It has also been demonstrated precisely that differentiation is caused by the genetic information in the developing embryo and *not by the mother.*[16] Even *molecular* information arising wtihin the embryo is determined ultimately by the *genetic* information in the one-cell zygote (by means of its "genetic information *cascade*"). *Molecular* information from the mother is only selectively *used* by the embryo. Such molecular information does not change the very *nature* of the human zygote. Finally, hydatidiform moles and teratomas *do not arise from genetically normal embryos,*[17] but from abnormal entities

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also, Thomas J. Bole, III, "Metaphysical accounts of the zygote as a person and the veto power of facts", *Journal of Medicine and Philosophy* 14 (1989), 647-653; also Bole, "Zygotes, souls, substances, and persons", *Journal of Medicine and Philosophy* 15 (1990), 637-652.

[16] H. Holtzer, J. Biekl and B. Holtzer, "Induction-dependent and lineage-dependent models for cell-diversification are mutually exclusive," *Progress in Clinical Biological Research* 175 (1985), 3-11; Mavilio et al (1983), op. cit., 664-8; C. Hart et al., "Homeobox gene complex on mouse chromosome II: molecular cloning, expression in embryogenesis, and homology to a human homeo box locus", *Cell* 43:1, (1985), 9-18.

[17] A.E. Szulmann, U. Surti, "The syndromes of hydatidiform mole. I. Cytogenic and morphologic correlations," *American Journal of Obstetrics and Gynecology* 131 (1978), 665-671; M.S.E. Wimmers, J.V. Van der Merwe, "Chromosome studies on early

(usually caused by dispermy or parthenogenic eggs; parthenogenesis in humans has never been reported [18]) which are *not*, therefore, genetically normal human beings to begin with.

McCormick and Grobstein [19] claim that "personhood" ("ensoulment") cannot take place until about 14 days. Before then there is only a *genetic* individual (a "potential" person); after, there is also a *developmental* individual—i.e., a real human person. After fertilization the human zygote undergoes *equal* divisions; after the third division the aggregate contains 8 cells "loosely connected". These cells are totipotent (each can produce a complete adult human being), so they are not *developmentally* single—and therefore, not a person. Before 14 days there is only a "pre-embryo" (a "non-person"). That is, at the 5-6 day stage, development does not primarily involve formation of the embryo and its parts [i.e., the inner blastocyst layer of cells] but the "non-embryonic" trophoblast [i.e., the outer layer of cells]. After birth *all of the cells from the trophoblast layer are discarded* as the placenta, etc. The presence of this non-essential trophoblast layer of cells indicates that the 5-6 day "pre-embryo" is not yet developmentally single, and therefore not a person. Also, individuality is not present before 14 days because: a) if *two* eight-cell stages of different parentage are *fused, a single* adult is produced, and; b) until 14 days and the formation of the primitive streak *twinning* can take place by division of the inner cell mass. After 14 days *twinning cannot take place* and the organism is finally "developmentally" single (and therefore a person). Finally, a developmental individual is not present until a single body axis (primitive streak) has begun to form, near the end of the *second post-fertilization week* when *implantation* is under way.

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human embryos fertilized *in vitro*," *Human Reproduction* 7 (1988), 894-900.

[18] Moore 1982, op. cit., 32.

[19] Richard McCormick, S.J., "Who or what is the preembryo?", *Kennedy of Ethics Journal* 1:1 (1991), 1.

However, empirically we know that the cells do *not* divide equally, but unequally. Also, totipotency is scientifically far more complicated than depicted. E.g., these cells do *not* each contain the same potential as each other or as the zygote. Totipotency is *normal*, and actually coded for by the genetic information in the human zygote. These cells are totipotent because certain genes have not yet been *silenced* by methylation (and other processes)—not because of the reverse claim, i.e., the cells "don't know how many individuals to be yet".[20]

And we know that the cells of the trophoblast layer are *not* "non-embryonic"; all of these cells are *not* discarded after birth. The dorsal part of the yolk sac is incorporated into the *later embryo* as the primordium of the primitive glut. The allantois is represented in the *adult* human being as a fibrous cord, the median umbilical ligament extending from the apex of the urinary bladder to the umbilicus. The allantois is also involved with early blood formation. The primitive blood cells are derived *mainly* from the epithelial cells of blood vessels in the yolk sac and the *annuantois*.[21] Thus, the pre-embryo *is both* a "genetic" and a "developmental" individual.

Furthermore, two eight-cell stages of different parentage do not "fuse". Perhaps they mean "recombination". But recombination is not used in this context; it is associated with the crossing over of the male and female genes during the meiotic division of *fertilization* itself. A chimera and mosaic are caused by *non-disjunction* of the chromosomes—not by either "fusion" or by "recombination". And these latter two situations can only arise *before* the 3-cell stage, not at the 8-cell stage. A *mosaic* is formed by cells of the *same* genetic origin, not

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[20] J. Lejeune, testimony in *Davis v. Davis*, Circuit Court for Blount County, State of Tennessee at Maryville, Tennessee, 1989; Kischer (1993), op. cit., 58-59.

[21] Moore (1982), p. 33, 62-63, 68, 111 and 127; W.J. Larsen. *Human Embryology* (New York: Churchill Livingstone, 1993), 19, 37-40.

by different parentages. A *chimera* can be formed from cells of different parentages, but this takes place at the *zygotic* stage, not at the 8-cell stage.[22]

Also, monozygotic twinning *can* take place *after* 14 days.[23] As Kischer notes, their depiction of "multiplicity" and "individuality" is scientifically simplistic. "Individuality" is determined in many cases before 14 days; 30% of monozygotc twinning occurs at the 2-cell to 8-cell stages—and *not* by division of the inner mass; multiplicity of birth from dizygotic origin appears to be familial (i.e., genetic); factors determining monozygotic twinning are *not* known; and multiplicity beyond twinning may include a combination of dizygotic and monozygotic-derived embryos.[24] Too much emphasis has been placed on twinning. If it occurs (either from mechanical or natural means), it only signifies that one *individual* has given way to two individuals. The individuality of the latter in no way diminishes the *reality* of the individuality of the former. Finally, implantation does *not* start at the end of the second week post-fertilization, but between 5-6 days. The beginning of the formation of the primitive streak is between 15-19 days, disappearing by the end of the fourth week.[25]

The extent of the inaccurate science used by McCormick and Grobstein (and others) has been puzzling to many embryologists. C. Ward Kischer, a prominent embryologist, remarks that McCormick's new *moral* status (or lack thereof) for the so-called "pre-embryo" is derived from Grobstein, whose "new embryological states" are "simply not true". He argues that the "scientific data" they use has been highly selected and *leaves out the majority of other relevant data*:

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[22] Emery (1983), op. cit., 57, 83-85.

[23] K. Dawson, "Segmentation and moral status", in P. Singer et al, *Embryo Experimentation* (New York: Cambridge University Press, 1990); see also, Moore (1982), 133.

[24] Kischer (1993), op. cit., 58-59.

[25] Moore (1982), op. cit., 53, 56; Kischer (1993), op. cit. 59.

> It is not a question as to whether science can or cannot decide the question of personhood. Science is *not interested* in deciding personhood. However, if the socio-legal status of personhood cannot be decided without invoking what is known scientifically, then the *whole* of scientific data should be used and not arbitrarily selected bits and pieces of data. (emphasis in the original)
>
> . . . *Human embryology is now in danger of being rewritten* as a stratagem statement of current socio-legal, but also of late, even theological, issues. Unless the errors are corrected now, we will be in danger of entering a protracted period of *false concepts concerning our own development.*[26] (emphasis added).

In sum, McCormick and Grobstein's distinction between a genetic individual (a "non-person") and a developmental individual (a "person"), as well as their claims about a so-called "pre-embryo" cannot be scientifically sustained. The scientifically inaccurate term "pre-embryo" ought to be excised from the bioethics and legal literature.

—Ford [27] argues for "personhood" at 14 days. Before that there are only "groups of cells", a "potential" person, or a "biological individual". Until the blastocyst stage, the cells have not been *fully differentiated,* which takes place after the formation of the *primitive streak* (when no twinning can occur). But scientifically we know that full differentiation is not completed until *early adulthood*; [28] certainly *it is not* completed by the 14-15 day stage. Finally, twinning *can* take place after 14 days.

—Wallace [29] argues for "delayed fetal personhood" by setting up a series of analogies. Each of the "succeeding souls" can be described, he claims, in terms of the "*ma-*

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[26] Kischer (1993), op. cit., 57-63.

[27] N. Ford, *When Did I Begin?* (New York: Cambridge University Press, 1988), 137, 156.

[28] Moore (1982), op. cit., 1.

[29] W. A. Wallace, "Nature and human nature as the norm in medical ethics,", in E.D. Pellegrino, J. Langan and J.C. Harvey,

ture" nature of the individuals of its species (e.g., a mature plant, a mature animal, and then a mature human species). If these descriptions are transferred to his *model* of human embryogenesis—or "delayed fetal personhood"—we should then consider each of these natures as *"transient"* natures which successively evolve until the "rational" nature (or "soul") is "infused" and "personhood" is finally attained. The "rational soul" cannot be "infused" until the "matter" is appropriately organized—at about 3 months, and it is the "rational soul" which makes the organism *specifically human* and which *directs and organizes* the matter as *human.*

But, empirically we know there is no such thing as *two* kinds of natures of one and the same specific kind of thing. There are not both "transient" and "mature" natures of a plant, an animal or a human being. An acorn is genetically an oak—albeit a tiny one. The analogy is empirically invalid. Also, if the "rational" human nature which is "infused" about 3 months as Wallace claims, is actually descriptive of a *"mature"* human nature, is it true then that a 3 month fetus is actually a mature human being—and acts and functions as one?

Finally, the matter is "appropriately organized" by the end of syngamy, when empirically there is already a human being with "46" chromosomes. Immediately specifically *human* enzymes and proteins are produced (not tomato or frog enzymes); all of the information for cleavage, differentiation, implantation, etc. is *already* present; by 3 months specifically *human* functions, reactions, tissues and organ formations have *already* taken *place* (*empirically the formation of cabbages or giraffe* tissues and organs has *not* taken place). There is no biological need for a "rational soul" to be infused to make it something it *already* is, i.e., specifically *human* and directing *human* formations. This has *already been done* by something back at the zygote stage. The very concept of "delayed fetal personhood" is untenable.

(eds.), *Catholic Perspectives on Medical Morals* (Dordrecht: Kluwer Academic Publishing, 1989), 23-53.

—Some argue [30] for various "marker events" of "personhood" from about 8 weeks to birth or early childhood (brain criteria, i.e., "rational attributes", or sentience—i.e., the ability to feel pain). Thus "personhood" is determined by the appearance of the nerve net, cortex or integration of the brain as a whole, etc. These *physical* structures are the *physiological precondition* for the *capacity* for either sentience, or for "rational attributes" (e.g., self-consciousness, autonomy, loving, willing, interacting with one's environment, etc.); or they signal *the actual exercising* of those capacities.

However, the advocates for the definition of a human person *only* in terms of either "rational attributes", or *only* in terms of sentience, are using definitions with very specific philosophical presuppositions: generally Cartesian, rationalist or empiricist. These presuppositions contain quite serious theoretical difficulties *precluding* them from realistically being used in these "personhood" debates (see Section C).

The *scientific evidence* for these claims is empirically vague, scientifically controversial, and only "posited" as theories. Many scientists criticize that there is a reading into the scientific evidence more than is physiologically or conceptually possible. E.g., Jones [31] argues that there is *no scientific evidence* which demonstrates the correlation of "consciousness" and the organizing of the nervous

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[30] E.g., D.G. Jones, "Brain birth and personal identity", *Journal of Medical Ethics* 15:4 (1989), 173-178; H.-M. Sass, "Brain life and brain death; a proposal for normative agreement", *Journal of Medicine and Philosophy* 14 (1989), 45-59; C.A. Tauer, "Personhood and human embryos and fetuses", *Journal of Medicine and Philosophy* 10 (1985), 253-266; M. Lockwood, "Warnock versus Powell (and Harradine); when does potentiality count?", *Bioethics* 3:5 (1988), 187-213; Clifford Grobstein, "The early development of human embryos", *Journal of Medicine and Philosophy* 10 (1985), 213-236; M.V. Bennett, "Personhood from a neuroscientific perspective", in Doerr et al, *Abortion Rights and Fetal "Personhood"* (Long Beach; Cresline Press, 1989).

[31] Jones (1989), ibid., 178.

system. Scientifically there is *no valid parallel,* he argues, between "brain death" and "brain birth". "Brain death" is the gradual or rapid cessation of the functions of a *brain*; "brain birth" is the very gradual acquisition of a function of a developing *neural* system (which is *not* a brain). There are no *neurological* reasons, he states, for concluding that an incapacity for consciousness becomes a capacity for consciousness once this point is past. The nervous system of the 8-week fetus is quite *different* from that of the 8 month fetus or 2 year old child. Thus it is *impossible,* he argues, to recognize a distinct point of transition from a "non-brain" to a "brain", or from a non-functioning nervous system to a functioning one. Therefore, Jones concludes, it is impossible to recognize a distinct point of transition from a "non-person" to a "person". To echo the above comments by Kischer, a different Jones has remarked:

> The reproductive biologist cannot assign moral status to the sperm or the egg or the fertilized egg or any of the subsequent products that may result from this fusion. . . The reproductive biologist can help, however, by assuring that other scientists or those who wish to assert a moral status, and use a biological term or concept to do so, *know what they are talking about.*[32] (emphasis added)

Therefore *none* of these arguments for "delayed personhood" at various biological "marker events" during human embryogenesis are scientifically valid. Every one of them is grounded on inaccurate or misapplied science. Thus they have *failed* to prove any real valid *scientific* distinction between a human being and a human person.

C. Arguments for "Delayed Fetal Personhood" Are Based On Historically Inaccurate Or Refutable Philosophical Presuppositions

Many of these arguments for "delayed fetal personhood" also incorporate philosophical claims which are

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[32] H.W. Jones and C. Schroder, "The process of human fertilization: implications for moral status", *Fertility and Sterility* 48:2 (August 1987), 192.

historically inaccurate. The extent of the inaccuracies and the impact they could have in this case, as well as in the formulation of public policy, requires at least they be briefly identified. *Different conclusions about "personhood" follow from different philosophical definitions of a human being or a human person.* For further detailed research, references are provided.[33]

Most historical inaccuracies concern the theories of some of the major figures in the history of philosophy. Philosophers such as Plato, Aristotle, the scholastics, Aquinas and Descartes are misinterpreted, conflated, or mixed together indiscriminately. The internal contradiction within Aristotle or Aquinas of a "succession of souls" with their mainstream metaphysics of being is not even acknowledged. The two philosophies are often basically equated, with no awareness of their inherent differences. Both are sometimes conflated with scholasticism. Their theories of act and potency are constantly depicted incorrectly (often the source of the contemporary *misuse* of the terms "potential" or "possible" human being or person) as are their theories of being, human being, human "soul", and natural law. No mention is made of the severe *chorismos* or "separation" problems of Plato's or Descartes' mind/body split, nor of the destructive consequences of these theoretical problems on their definitions of a human person or scientific theories. Part of Aristotle's metaphysics is virtually grafted onto Englehardt's "metaphysics". Descartes' purely *immaterial* rational attributes are mixed invalidly with a Lockean *materialistic* theory of sentience, theoretically *negating* any conclusions. This is not a question of "interpretations" or of "translations"—but simply the misrepresentation of acknowledged historical fact. All of these historical inaccuracies and theoret-

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[33] For a detailed study see D. N. Irving, *Philosophical and Scientific Analysis of the Nature of the Early Human Embryo,* (doctoral dissertation, Georgetown University, Department of Philosophy, Washington, D.C., 1991 (especially the summaries on pp. 23, 53, 59, 70, 82, 114, 131, 145, 169, 205, 247, 259; as well as Chapter Five, and Appendices A and B).

ical contradictions in the premises become embedded in the conclusions of the arguments, determining the definition of "person" as well as the choice of biological markers which a writer selects for "delayed fetal personhood".

Also, historically, there are a number of different "schools" of philosophy which developed over the centuries which often came to different and contradictory philosophical conclusions about reality. Each "school" defined "*being*" differently, and therefore each defined a *human* being differently.[34] We are all heirs of this legacy —no matter what our academic "field" is.[35]

Some schools (e.g., Plato, many scholastics and Descartes),[36] argue a human being is defined as at least *two substances*—e.g., "soul" (or mind), and body—existing *independently* of each other. The major chronic theoretical problem with these dualistic definitions is that therefore there is a mind/body split; thus absolutely *no*

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[34] E. Gilson (1963), op. cit., esp. Chap. 1; K. Doran (1989), op. cit., 38-49.

[35] A.C. Crombie, *Medieval and Early Modern Science* (New York: Doubleday Anchor Books, 1959), 10; D. Allen, *Philosophy For Understanding Theology* (Atlanta: John Knox Press, 1985).

[36] G. Vlastos, *Plato: A Collection of Critical Essay* (Indiana: University of Notre Dame Press, 1978); Jowett, *The Dialogues of Plato* (New York: Random House, 1937); Rene Descartes, *Meditations on First Philosophy,* in J. Cottingham et al (trans.), *The Philosophical Writings of Descartes* (New York Press Syndicate of the University of Cambridge, 1984), 2nd Med., 12; for typical discussions of the theoretical problems of Cartesians, rationalists and empiricists, see: L.J. Eslick, "The material substrate in Plato", in E. McMullin, (ed.), *The Concept of Matter in Greek and Medieval Philosophy* (Indiana: University of Notre Dame Press, 1963); C. Fox, *Locke and the Scriblerians: Identity and Consciousness in Early Eighteenth-Century Britain* (Los Angeles: University of California Press, 1989); G. Meilander, *Challenging the Limits of Dualism* (University Park, PA; Pennsylvania State University Press, 1987); F. Wilhelmson, *Man's Knowledge of Reality* (New Jersey: Prentice-Hall, Inc., 1956); F. Copleston, *A History of Philosophy* (New York: Image Books, Vols. 1-9, 1962); E. Gilson (1963), op. cit.; N. Kemp-Smith, *A Commentary to Kant's "Critique of Pure Reason"* (London: The Macmillan Press Ltd., 1979), xxxiv, xlii, xliv.

interaction is explainable or actually possible between these two *separate* substances—i.e., between the immaterial "Mind" and the separated material "Body" (its physiological substrate.)

Some schools (e.g., rationalists) define a human being as only *one* of the two above "Cartesian" substances—e.g., Reason (or mind). As noted, if "personhood" is defined *only* in terms of "rational attributes", *then the following list of human beings are not persons*: e.g., the mentally ill, Alzheimer's and Parkinsonian patients, stroke victims, comatose and persistent vegetative state patients, drug addicts, drunks, alcoholics. Since empirically self-consciousness, autonomy, etc. are not actually present until *early childhood* [37], they must (and do) also argue for the permissibility of the infanticide of perfectly normal human infants. This rationalistic position has been generally articulated in the literature by writers such as Engelhardt and Tooley, who argue for the permissibility of infanticide.[38]

Some schools (e.g., empiricists) define a human being as only *one* of the other two "Cartesian" substances—e.g., Body or matter. This position is often used in the current literature to argue that some higher primates *are* persons, and some human beings are *not* persons. If one is arguing that a "human person" is defined *only* in terms of sentience or the physical integration or functioning of the brain, then one will also have to argue for the permissibility of infanticide, because empirically full integration and sentience is also not completed until several years *after* birth.

This is, indeed, the conclusion of writers such as Kuhse, Wells and Peter Singer.[39] Noting that he agrees with

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[37] Moore (1982), op. cit., 1.

[38] H.T. Engelhardt, *The Foundation of Bioethics* (New York; Oxford University Press, 1985), 111; M. Tooley, "Abortion and Infanticide," in *The Rights and Wrongs of Abortion*, M. Cohen et al (ed.) (New Jersey: Princeton University Press, 1974), 59 and 64.

[39] P. Singer and H. Kuhse, "The ethics of embryo research", *Law, Medicine and Health Care* 14:13-14 (1987); Kuhse and Singer, "For sometimes letting—and helping—die", *Law, Medicine*

Bentham's description of infanticide as "of a nature not to give the slightest inquietude to the most timid imagination", Singer states:

> If the fetus does not have the same claim to life as a person, it appears that the *newborn baby does not either*, and the life of a newborn baby is of *less value than the life of a pig, a dog, or a chimpanzee.* (emphasis added).[40]

Singer continues that we should put aside feelings based on the smallness, helplessness or—sometimes—cute appearances of human infants, and then we can see that *the grounds for not killing persons do not apply to newborn infants.*[41] This Court must consider the logical consequences of incorporating into law these rationalist and empiricist arguments which logically *must* conclude that many adult human beings are *not* persons and that the infanticide of perfectly normal human infants and children is permissible or consonant with the Constitution or acceptable public policy.

If the very theoretical structure of an argument is undermined by the use of inaccurate science and blatantly indefensible and objectively refuted problematic philosophical presuppositions, then the conclusions of these arguments should not be persuasive or accepted—much less incorporated into state or federal law.

CONCLUSION

For all of the foregoing reasons, the University Faculty For Life strongly urges the Court to grant the Petition for Writ of Certiorari of J.M., individually.

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and Health Care 3:40 (1986), 149-153; Kuhse and Singer, *Should The Baby Live? The Problem of Handicapped Infants* (Oxford University Press, 1985), 138.

[40] P. Singer, "Taking life: abortion", in *Practical Ethics* (London: Cambridge University Press, 1981), 122-123.

[41] *Ibid.*, 123-124.

Respectfully submitted,

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No. 92-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

J.M., INDIVIDUALLY,

Petitioner,

- against -

V.C., [redacted],

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI TO SUPREME COURT OF NEW JERSEY AND MOTION FOR LEAVE TO FILE AMICI BRIEF

WORLD FEDERATION OF DOCTORS WHO RESPECT HUMAN LIFE; AMERICAN ACADEMY OF MEDICAL ETHICS; AMERICAN LIFE LEAGUE, INC.; CANADIAN PHYSICIANS FOR LIFE; CATHOLIC ASSOCIATION OF SCIENTISTS AND ENGINEERS; DENTISTS FOR LIFE; INTERNATIONAL RIGHT TO LIFE FEDERATION; LIFE ISSUES INSTITUTE, INC.; NATIONAL ASSOCIATION OF PRO-LIFE NURSES; NATIONAL FEDERATION OF CATHOLIC PHYSICIANS' GUILDS; PHARMACISTS FOR LIFE; PHILADELPHIA CATHOLIC PHYSICIANS GUILD; PHILIPPINE ASSOCIATION OF FAMILY PHYSICIANS IN AMERICA; SCIENTISTS FOR LIFE; THE GUILD OF ST. LUKE, S.S. COSMAS & DAMIAN; AND NEW ZEALAND DOCTORS FOR LIFE AS AMICI CURIAE IN SUPPORT OF PETITION

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The amicus curiae, World Federation of Doctors Who Respect Human Life; American Academy of Medical Ethics; American Life League, Inc.; Canadian Physicians For Life; Catholic Association of Scientists and Engineers; Dentists for Life; International Right to Life Federation; Life Issues Institute, Inc.; National Association of Pro-Life Nurses; National Federation of Catholic Physicians' Guilds; Pharmacists for Life; Philadelphia Catholic Physicians Guild; Philippine Association of Family Physicians In America; Scientists for Life; The Guild of St. Luke, S.S. Cosmas & Damian; and New Zealand Doctors for Life hereby move the court for leave to file an amici curiae brief in support of the petitioner, J.M. Counsel for petitioner consents to the filing of the brief, but counsel for Respondent, V.C. declined consent.

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In The

Supreme Court Of The United States

OCTOBER TERM, 1992

No. 92-

J.M., individually
Petitioner

v.

V.C., *et al.*,
Respondents

INTEREST OF AMICI

WORLD FEDERATION OF DOCTORS WHO RESPECT HUMAN LIFE

This federation is truly worldwide, boasting a membership of 350,000 physicians from 65 nations. The federation has a constituent membership of 75 member organizations from around the world, including Doctors for Life which is headquartered in St. Louis, Missouri. WFDRHL is headquartered in Ostend, Belgium and has executives and regional coordinators around the world.

One of the main purposes of WFDRHL is to promote appropriate respect for human life among members of the world medical community. WFDRHL's members subscribe to the principles that from the moment of fertilization, a human being is alive and entirely distinct from the mother who provides nourishment and protection; that from fertilization to old age, it is the same human being who grows old, develops, matures, and eventually dies; that each human being is unique and therefore irreplaceable; that medicine should have absolute respect for human life regardless of age, illness, disability or degree of dependence and it should serve life from its beginning as well as when it is failing; that when a physician is confronted with a tragic situation, the doctor's duty is to do everything possible to help both the mother and her child; and that the killing an unborn human for social, economic or eugenic reasons is directly contradictory to the role of the doctor.

AMERICAN ACADEMY OF MEDICAL ETHICS

AAME was incorporated in Indiana in 1986 and has a membership of 22,000 physicians in all fields of medicine throughout the United States and Canada.

AAME is dedicated to the sanctity and defense of human life from conception until natural death and seeks to return American medicine to the original principles of the Hippocratic Oath. AAME is engaged in supporting appropriate legislative action, education and training and conducts seminars and produces and disseminates medical publications.

AMERICAN LIFE LEAGUE, INC.

ALL was incorporated in Virginia in 1979. It has a membership comprised of 250,000 families from across the United States.

ALL works to achieve an American society in which all human life is respected and protected from fertilization until natural death. It helps form public policies that respect and protect all human beings, born and unborn. ALL informs and educates Americans on pro-life issues. It produces media and legislative tools, including books, pamphlets, position papers, briefs, model legislation and produces a weekly one-half hour national television program.

CANADIAN PHYSICIANS FOR LIFE

CPL is a federally incorporated Canadian corporation which maintains its offices in Ontario, Canada. CPL was formed in 1975 and has an approximate membership of 1,000 physicians which membership is drawn throughout Canada.

CPL is a secular, non-denominational organization whose principal purposes include providing leadership and education by and to physicians who believe in the sanctity and defense of human life from the moment of conception until natural death. CPL's goal is to reach out to Canadian physicians who share a common belief regarding the sanctity of human life.

CATHOLIC ASSOCIATION OF SCIENTISTS AND ENGINEERS

CASE was formed in Maryland on May 13, 1992, when it was incorporated. The association is comprised of scientists, physicists and engineers from different parts of the United States.

CASE is dedicated to the sanctity and defense of human life from the moment of conception until natural death and CASE is committed to apply its scientific and technological skills in support of this principle.

DENTISTS FOR LIFE

DFL was organized in 1988 in Pennsylvania. Its purpose is to foster the sanctity and defense of human life from the moment of conception until natural death and DFL is committed to the application of medical and technological skills in support of these principles. DFL is strongly opposed to abortion, euthanasia and infanticide. DFL is an American Life League affiliate.

DFL, which is comprised of approximately 50 dentists from 15 chapters across the United States, initiates pro-life activities in their communities and the organization provides free dental services and education to pregnant women. DFL raises no money and accepts no donations.

INTERNATIONAL RIGHT TO LIFE FEDERATION

IRTLF is a non-denominational, non-partisan, international educational group which was organized approximately 10 years ago. It has its main office in Rome, Italy.

IRTLF's principal function is to promote education and communication between the various national right to life groups throughout the world. IRTLF sponsors an average of two to four educational congresses annually. Its two most recent congresses were held in Lithuania and Moscow in October 1992 and additional meetings will be held soon in Central America, India and Australia.

IRTLF's board is comprised of delegates from Canada, the United States, South America, Africa, the sub-continent of India, Australia, Japan, Eastern Europe and two delegates from Western Europe. IRTLF has Non-Governmental Organization status in the

United Nations and is regularly represented in Geneva, Switzerland on issues pertaining to respect for human life. IRTLF's representative also engages in lobbying the European Parliament in Strasbourg, France.

John C. Willke, M.D., the federation's president, has authored nine books in the field of human sexuality and abortion, including Handbook on Abortion, which is the most widely read book in the world presenting the scientific case for the unborn. It has been translated into 22 languages. Dr. Willke has appeared on virtually every television show in the United States where abortion has been a topic and conducts a daily radio program which is carried by almost 300 radio stations.

LIFE ISSUES INSTITUTE, INC.

LII is a corporation that has been in existence for more than 18 years. It has operated under its current name for two years. LII has a governing body of five members who are from Maine, Iowa, Indiana and two from Ohio.

LII is an educational foundation whose goals include the development of a broad-based national effort to stimulate and guide a renewal of pro-life education throughout the United States. Its mission is to assure equal protection under the law for all human beings from the beginning of their biological lives at fertilization until natural death. LII functions as a "think tank" to accomplish its mission. In addition to LII's usual educational activities, LII supports a daily commentary on life issues which is presented on almost 300 radio stations nationwide.

NATIONAL ASSOCIATION OF PRO-LIFE NURSES

NAPLN was organized in 1973 and subsequently incorporated in 1979 in Minnesota.

This organization is dedicated to the sanctity of human life from conception until natural death and works to unite nurses who seek to achieve excellence in nurturing and caring for the unborn, new born, the ill and dying. NAPLN members adhere to a code of ethical standards governing their role in caring for patients' lives.

NAPLN provides educational programs and disseminates information on medical and legal issues pertaining to the nursing profession. It supports research which is beneficial to humanity and the preservation of human life at all stages of development.

NAPLN's membership approximates 1,000 registered and licensed practical nurses, both active and retired and nursing students from across the United States.

NATIONAL FEDERATION OF CATHOLIC PHYSICIANS' GUILDS

NFCPG is a federation headquartered in Elm Grove, Wisconsin, which is comprised of Catholic Physicians Guilds from across the United States. It currently has a membership of approximately 6,000 physicians.

Among NFCPG's purposes is to provide an organization of physicians and dentists who can provide leadership based upon their knowledge, skill and experience in the medical field, including leadership concerning important medical and ethical issues of the day. NFCPG also promulgates concepts of medical ethics among the medical profession in general and in society at large.

NFCPG believes and submits that the scientific evidence clearly supports the view that the life of each individual begins at conception.

PHARMACISTS FOR LIFE

PFL was incorporated in Ohio in 1984. It has a membership of more than 1,000 pharmacists and scientists which is drawn from across the United States and from every continent in the world.

PFL supports the sanctity and defense of human life from the moment of conception until natural death and works to achieve these goals through the application of its members' scientific, medical and technological skills. PFL conducts educational programs and scientific research by and for pharmacists, scientists and other health professionals, as well as the general public.

PHILADELPHIA CATHOLIC PHYSICIANS GUILD

PCPG was organized more than 20 years ago in Philadelphia, Pennsylvania. It is the largest Catholic physicians group in the country with hundreds of members from the Delaware Valley area.

PCPG informs and assists the Cardinal of the Philadelphia Catholic Archdiocese and renders assistance to charitable organizations. PCPG gives aid and assistance to the homeless, it runs clinics for homeless women and for children. PCPG members lecture at high schools on the subjects of abortion and euthanasia, both of which practices PCPG opposes.

PHILIPPINE ASSOCIATION OF FAMILY PHYSICIANS IN AMERICA

PAFPA was incorporated in Michigan in 1990. It is comprised of family physicians of Philippine descent from across the United States. It currently has a membership of approximately 130.

PAFPA promotes the practice of medicine by family physicians and is committed to the principle that human life begins at conception. PAFPA disseminates information on matters relating to family practice, including those advocating the pro-life position.

SCIENTISTS FOR LIFE

SFL was incorpoated in Ohio in 1991.

SFL is an organization comprised of persons with professional degrees in the sciences, including medicine, with a national membership of approximately 150, plus several European members. SFL publishes a quarterly newsletter which is sent to about 300 readers.

The principal purpose of SFL is to educate people and disseminate scientific information concerning life issues, including abortion and euthanasia, two practices to which SFL is opposed.

THE GUILD OF ST. LUKE, S.S. COSMAS & DAMIAN

GSL is an unincorporated guild of Catholic doctors, organized in Wellington, New Zealand in 1954.

GSL's purposes include the promotion of the spiritual and intellectual welfare of Catholic Medical Practitioners, to study and discuss medical problems, especially those of a moral, ethical, philosophical and spiritual nature, and to uphold the moral law in the practice of medicine.

GSL engages in the formation of study groups to investigate ethical issues and to prepare submissions for the legislature. Members participate on spiritual retreats and in social gatherings to support and strengthen the stand on moral issues.

NEW ZEALAND DOCTORS FOR LIFE

New Zealand Doctors for Life was organized in 1981 by a group of physicians who believe that taking life, no matter how old, how young, or how apparently useless, is foreign to the nature of medicine. The Doctors for Life aim to: (1) practice and promote ethical medicine as described by the Declaration of Geneva of the World Medical Association 1948; (2) educate and encourage the medical profession and society at large regarding our professional responsibility towards humanity; (3) to further legal protection for all members of the human race, both born and unborn; and (4) to promote scientific, social and economic measures which will facilitate the practice of ethical medicine.

SUMMARY OF ARGUMENT

A Writ of Certiorari should be granted in this case because the enormous amount of new scientific information obtained in the past five to ten years makes it clear that their can be no doubt that the child is a human being before birth and from the moment of conception. An explosion of scientific technology has totally revolutionized how mankind obtains knowledge concerning the unique identity, completeness and the development of the child

from conception to birth. Science now learns on a molecular level which has proven many of the assumptions made at the time of *Roe v. Wade* (based upon the primitive methodology of that era) to be totally false.

It is now known that children can experience pain during surgical abortions as early as eight weeks after conception. The old assumptions concerning how human beings feel pain must totally discarded. These revelations require a determination, now, that the child is a human being from conception because abortion is the painful death of a human being.

ARGUMENT

I. THE LIFE OF A CHILD BEGINS AT CONCEPTION. THE NUMEROUS AND SIGNIFICANT SCIENTIFIC DISCOVERIES SINCE *ROE V. WADE* SUPPORT THIS CONCLUSION. THERE NOW EXISTS A CONSENSUS IN SCIENCE AND MEDICINE CONCERNING THE FACTS WHICH FORM THE BASIS FOR THIS CONCLUSION. THIS COURT SHOULD GRANT THE WRIT TO DECIDE WHEN LIFE BEGINS AND THE RIGHTS OF THE CHILD.

A. Introduction

Since the Supreme Court's decision in *Roe v. Wade* in 1973, there has been an explosion in scientific technology which has fundamentally altered the capability and manner in which science acquires knowledge of human development. These recent advancements mean science can now investigate human development at

the molecular level, using recombinant DNA technology[1] and monoclonal antibody technology,[2] if the instructions (made up of DNA and RNA) to make a particular protein exist and also if that instruction has been transcribed (read). Today, science can determine if a specific protein has indeed been produced from specific genetic instruction.[3] These scientific techniques, combined with immunochemistry technology, can be used to show that a particular protein is present in a specific sample; and when this is combined with an appropriate visualization technique, the location of the protein in the sample can be determined.[4] In 1973 most of our knowledge concerning human identity and development before birth was based upon gross morphological observations. Mankind did not have the capability we have today to

[1] Watson, J.D.; Tooze, J.; and Kurtz, D.T. *Recombinant DNA: A Short Course*. San Francisco: W.H. Freman, 1983.

[2] Campbell, A.M. "Monoclonal Antibody Technology" In *Laboratory Techniques and Biochemistry and Molecular Biology*, edited by R.H. Burdon and P.H. Van Knippenberg. Eisevier (Amsterdam), 1985.

[3] Martinis, J.; David, G.S.; Bartholomew, R.M.; and Wang, R. "Novel Applications of Monoclonal Antibodies." In *Basic Biology of New Development* In *Biotechnology* In *Basic Life Sciences* 25(1983): 129-154, at p. 129.

[4] Since the *Roe* Court commented upon the then current knowledge of mankind in 1973, there have been many scientific, medical and technological discoveries, some very recent. These have been adequately set forth and described in J.M.'s petition filed with the court (see, Pet. at 18-19).

examine and study on a molecular level. In 1973 a scientist would observe a physical structure such as the cerebral cortex or dendritic spines, and when that structure was not present or was removed, the scientist would observe what appeared to happen (the visual result). Today we can learn what is occuring in human development before we can see specific structures develop. Scientists can now look at a human's building blocks, the proteins and instructions that control the proteins, so they view not only what develops at a molecular level, but when it develops. On a macroscopic level, the new technology of ultrasound and its application to the study of the child in utero (in the womb) has accommodated observation of, with unprecedented clarity, the child and how he or she reacts to its environment. Advances in electroencephalography have allowed for the early detection of brain wave activity in the fetus. The results of these investigations demonstrate the level of ignorance concerning the child in 1973. Today we understand that there were incorrect assumptions at that time concerning the child's existence as a unique human being from conception, his or her development from conception to old age, and the child's ability to react to its environment and to feel pain prior to birth.

The origin and extensive use of the molecular biological techniques since 1973 have dramatically changed the way in which modern biology is conducted. By using DNA probe technology, combined with the Southern Hybridization technique, for example, scientists are able to detect the presence or absence of a specific genetic code or instruction in a sample of tissue. When DNA probe techniques are combined with polymerase chain reaction (PCR)[5] it is possible to identify the presence of a specific genetic code material in a sample as small as one cell[6]. The technology can determine genetic uniqueness, research genetic diseases, and observe human development at a molecular level, as never before. This is done through the analysis of human genes.

B. The Life of Each Person Begins at Conception.

[5] Arnheim, N.; and Levenson, C.H. 1990. "Polymerase Chain Reaction." *Chemical & Engineering News* (Oct. 1990): 36-47, at p. 36. White, T.J.; Arnheim, N.; and Erlich, H.A. "The Polymerase Chain Reaction." *Trends Genet* 5(1989): 185-189, at p. 185. Arnheim, N.; White, T.; and Rainey, W. "Application of PCR: "Organismal and Population Biology." *Bioscience* 40(1990):174-182, at p. 174.

[6] Holding, C.; and Monk, M. "Diagnosis of Beta-Thalassaemia by DNA Amplification in Single Blastomeres from Mouse Preimplantation Embryos." *Lancet* II (1989): 532-535. Handyside, A.H.; Pattinson, J.K.; Penketh, R.J.A.; Delhanty, J.D.A.; Winston, R.M.L.; and Toddenham, E.G.D. "Biopsy of Human Preimplantation Embryos and Sexing by DNA Amplification." *Lancet* I (1989):347-349.

The life of a human being begins at the moment of conception when the sperm of a father penetrates inside the mother's ovum and all of the genetic material and information for the complete development of a unique individual human being is present. The information carried by the father encounters in the same recipient cell the information transmitted by the mother so that suddenly, almost instantaneously, a new constitution is spelled out in genetic terms and everything that is necessary to be a human being is present immediately after conception.[7] Either all the necessary gene-

[7] Gilbert, S.F., *Developmental Biology*, Sinauer Ass. Inc., 1985, p.32-37, 58-63; Lugo, J.O.; and Hershey, G.L. *Human Development: A Multi-Disciplinary Approach to the Psychology of Individual Growth*. New York: Macmillan Publishing Co., Inc., 1974. "The growth of every human being begins with a special cell, the fertilized ovum. Although the diameter of the ovum is approximaely 1/175 of an inch and its weight is about one 20 millionth of an ounce, all the genetic potentialities for the complete development of a human being are contained within it. From this microscopically small cell, a baby composed of about 200 billion cells of different kinds will develop during the next nine months. This striking phenomenon of growth is common in all human beings." p. 242; Mussen, P.H.; Conger, J.J.; and Kagan, J. *Child Development and Personality* 5th ed. New York: Harper & Row, 1979. "The life of each individual begins when a sperm cell from the father penetrates the wall of an ovum, or egg, from the mother." p. 52. "Life begins at conception. But what of the forces that, throughout the individual's existence, will influence his or her development? When do they begin? The answer, again, is at conception. At the moment that the tiny tadpole-shgaped sperm penetrates the wall of the ovum, it releases 23 minute particles called chromosomes. At approximately the same time, the nucleus, the inner core of the ovum, breaks up, releasing 23 chromosomes of its own." pp. 52-53. "This process is of great interest to us because it has been established through painstaking research that these chromosomes, which are further subdividied into even smaller particles called genes, are the carriers of the child's heredity. All the child's biological heritage from the father and mother is contained in these 46 chromosomes." p. 53. Thibodeau, G. *Anatomy and Physiology*. St. Louis: Times Mirror/Mosby College Publishing, 1987. "Half of the 46 chromosomes in the zygote nucleus have come

tic information is present for conception of a human being for development to full stages of human growth (after the moment of the entry of the sperm into the ovum) or the genetic information is insufficient, conception will fail and no human being shall exist.[8] Not only is it possible to identify this first cell after conception as being human, the individual entity is complete and can be identi-

from the sperm and half from the ovum. Since chromosomes are composed of genes, the new being inherits half of its genes and the characteristics they determine form its father and half from its mother. Genetically, the zygote is complete. Time and nourishment are all that is needed for expression of those characteristics such as sex, body build, and skin color that were determined at fertlization." Thibodeau, G.A.; and Anthony, C.P. *Structure and Function of the Body* 8th ed. St. Louis: Times Mirror/Mosby College Publishers, 1988. "The science of the development of the individual before birth is called embryology. It is a story of miracles, describing the means by which a new human life is started and the steps by which a single microscopic cell is transformed into a complex human being." pp. 409-410. "Genetically the zygote is complete. It represents a new single celled individual." Moore K. *Before We Are Born*, 3rd ed. Philadelphia: WB Saunders Co. 1989. "Human development begins at fertlization when a male gamete or sperm fuses with a female gamete or ovum to form a zygote. The zygote is the first cell of a new human being." p. 25. The record in this case contains some reliable testimony of Dr. Jerome LeJeune on this and other points. His description of the genetic phenomina is of assistance to the Court in understanding the events and developments on this point, see, LeJeune, at A-97 to A-99. See also, the numerous authorities found following petition at A-19 to A-30.

[8] Volpe, E.P., *Seeds of Life, In Biology and Human Concerns* (1983), Stout, J., 3rd Ed. Wm. C. Brown Co., p.18-20; Gilbert, S.F., *Developmental Biology*, Sinauer Ass. Inc., 1985, p.32-37, 58-63; Oppenheimer, S.B., et al. *Introduction to Embryonic Development*, 1989, Allyn and Bacon; Editorial Production Service, Lifland, et al. Bookmakers, p.20-60; Bernstein, R. et al. *Biology: The Study of Life* (1982), Harcorth, Brace, Jocvanovick, Inc. p. 584. See, also, LeJeune at 97.

fied.[9] This new constitution is complete. There is without doubt a complete, separate, identifiable human being immediately after conception.[10]

[9] Moore, K. *Before We Are Born*, 3rd ed. Philadelphia W.B. Saunders Company 1989. "Fusion of the two haploid gametes or germ cells (each with 23 chromosomes) produce a zygote, which is a diploid cell with 46 chromosomes, the normal number for the human species." p. 26. Turner, J.S.; and Helms, D.B. Lifespan Developmental 2nd ed. CBS College Publishing (Hold, Rinehart, and Winston), 1983. "Yet far more remarkable than the birth itself is the process whereby a single fertilized egg develops into a fully functioning infant - complete with arms, legs, nose, eyes, ears, internal organs, and an individuality all of its own. The key to this magnificent story is a special code contained in the nucleus of a cell. This code, unique and different for every individual, is just now becoming understood by scientists." p. 52 "Each species of plant and animal and every individual wihtin a species has a full set of directions locked inside its nucleus. This is what makes a mouse different from a bird, a flower different from a tree, and siblings different from each other." p. 52. Clark, J.; ed. *Genetics and Heredity: The Blueprints of Life*, In *The Human Body*. Torstar Books, Inc., 1985. "You are unique because the combination of your genes is unique, and nobody has exactly the same combination (evenif you are an identical twin - although between such twins there are only subtle differences). Genes provide the fundamental information that determines how a person develops, although environmental acts to shape the final product from the moment of conception onward."

[10] Moore, *supra*, 26-28; Volpe, *supra*, 18-20. Anthony C.P.; and Kolthoff, N.J. *Textbook of Anatomy and Physiology* 9th ed. St. Louis: the C.V. Mosby Company, 1975. Audesirk, G.; and Audesink, T. *Biology: Life on Earth*. 2nd ed. New York: Macmillian Publishing Company, 1989. Bernard, H.W. *Human Development in Western Culture* 4th ed. Boston: Allyn & Bacon, Inc., 1975. Bernstein, R. and Bernstein, S. *Biology: The Study of Life*. New York: Harcourt Brace Jovanovick, Inc., 1982. Bryant, N.J. *Disputed Paternity*. New York: Brian C. Decker, a Division of Thieme-Stratton, Inc., 1980. Clark, J. ed. *The Nervous System: Circuits of Communication In The Human Body*. Torstar Books, Inc., 1985. Clark, J.; ed. *Growth and Development: The Span of Life In The Human Body*. Torstar Books, Inc., 1985. Clark, J.; ed. *Genetics and Heredity: The Blueprints of Life*, In *The Human Body*. Torstar Books, Inc., 1985. Craig, G. *Human Development* 4th ed. Englewood Cliffs, NJ: Prentice-Hall, 1986. Crouch, J.E. *Functional Human Anatomy* 4th ed. Philadelphia: Lea & Febiger, 1985. DeCoursey, R.M. *The Human Organism* 4th ed. McGraw-Hill, Inc., 1974. Fitzgerald, H.E.; Strommen, E.A.; and McKinney, J.P. *Developmental Psychology: The Infant and Young Child*. Homewood, IL: The Dorsey Press, 1977. Gilbert, S.F. *Development Biology*. Sunderland, MA: Sinauer Associates, Inc., 1985. Goin,

Within the process of fertilization is an extraordinary device employed by nature to protect the privacy of the life of the person immediately after conception. The egg, a little sphere of one and one-half millimeters in diameter is protected by a transparent membrane (the zona pellucida) which completely covers the egg. Immediately upon a single sperm burrowing inside the zona pellucida, the transparent membrane suddenly becomes physically

C.J.; and Goin, O.B. *Man and the Natural World* 2nd ed. New York: Macmillan Publishing Co., Inc., 1975. Goldenring, J.M. *Development of the Fetal Brain*. 307 The New England Journal of Medicine 564(1982). Harlock, E.B. *Child Development* 6th ed. McGraw-Hill, Inc., 1978. Jennett, S. *Human Physiology*. New York: Churchill Livingstone, 1989. Kaluger, G.; and Kaluger, M. *Human Development: The Span of Life*. St. Louis: The C.V. Mosby Company, 1974. Lugo, J.O.; and Hershey, G.L. *Human Development: A Multi-Disciplinary Approach to the Psychology of Individual Growth*. New York: Macmillan Publishing Co., Inc., 1974. Mader, S.S. *Inquiry into Life*. Dobuque, Iowa: Wm. C. Brown Company Publishers, 1976. Moore, K. *Before We Are Born* 3rd ed. Philadelphia: W.B. Saunders Company, 1989. Munsinger, H. *Fundamentals of Child Development* 2nd ed. New York: Holt, Rinehart, and Winston, Inc., 1975. Mussen, P.H.; Conger, J.J.; and Kagan, J. *Child Development and Personality* 5th ed. New York: Harper & Row, 1979. Nelson, G.E. *Biological Principles with Human Applications* 3rd ed. New York: John Wiley & Sons, 1989. Parker, S. *Life Before Birth: The Story of the First Nine Months*. Cambridge: Cambridge University press, 1979. Pikunas, J. *Human Development: An Emergent Science*. McGraw-Hill, Inc., 1976. Scarr, S.; Weinberg, R.A.; and Levine A. *Understanding Development*. Harcourt Brace Jovanovich, Inc., 1986. Schuster, S.h.; and Asburn, S.S. *The Process of Human Development: A Holistic Life-Span Approach* 2nd ed. Boston: Little, Brown, and Company, 1986. Strand, F.L. *Physiology: A Regulatory Systems Approach*. New York: Macmillan Publishing Company, Inc., 1978. Sussman, L.N. *Paternity Testing By Blood Grouping*. Springfield, IL: Charles C. Thomas Publisher, 1976. Thibodeau, G.A.; and Anthony, C.P. *Structure and Function of the Body* 8th ed. St. Louis: Times Mirror/Mosby College Publishers, 1988. Thibodeau, G. *Anatomy and Physiology*. St. Louis: Times Mirror/Mosby College Publishing, 1987. Turner, J.S.; and Helms, D.B. *Lifespan Developmental* 2nd ed. CBS College Publishing (Hold, Rinehart, and Winston), 1983. Volpe, E.P. *Biology and Human Concerns* 3rd ed. Dobuque, Iowa: Wm. C. Brown Company Publishers, 1983.

changed and within microseconds becomes completely impenetrable by any other sperm.[11]

The necessary genetic information to create a human being is created in DNA. Petitioner's genetic expert provides a useful description of this information: physically, it is analogous to a minute flat ribbon of tape that is used in a tape recorder. Inside the head of a sperm is a long thread of one meter or so which is so tightly coiled in twenty-three little pieces that the whole of its volume can be put on the point of a needle. It contains twenty-three chromosomes. The ovum also contains twenty three chromosomes.

The interaction of the biological components can be analogized to the process of a tape recorder which plays music. When a mini cassette on which the music of an artist such as Mozart is recorded and placed into a tape recorder, one experiences the sound of a symphony. The tape itself has no notes or music, and there are no musicians. Because there is a special code written on the tape, information is conveyed in such a way that the tape recorder will read it and make air move through a loud speaker. What is experienced by a listener is not an orchestra, not musicians, not evi-

[11] *Moore*, supra, at 25.

dence of music, but the genius of the author. That is how life is played: inside the egg which receives the tape band from the father which has its own tape bands, there forms a sort of table or law of life. Within the egg is a tremendous amount of information to be received and interpreted. The genetic information necessary to form the completed human being is not only the long ribbon of DNA (which through the analogy is the mini cassettes of the symphony), but information in the cell itself, which reads it. The cell is an analogous to the magnetiscope of the tape recorder and possesses within it enormous information.[12]

Methylation of cytosine, discovered about five years ago, supports the conclusion that a human being is a complete person upon conception. It was discovered that DNA contains basic information like a program which instructs specific development of the human being, so that some development is programmed to take place immediately, other development at specific stages later. Every single stage of growth is programmed at conception, but

[12] See, LeJeune, petitioner's appendix A-98 to A-100.

only manifests itself as the program is read.[13] This is a significant and new understanding that science could never have anticipated at the time of *Roe v. Wade*. It removes doubt about the nature and completeness of the person at conception.

Other developments in technology have resulted in discoveries which support the conclusion that a human being is genetically complete at the moment of conception.

In ~~1896~~ 1986 science discovered and developed a technique which can determine the identity of a specific human being. The technique, known as genetic fingerprinting extracts DNA, examines it and records unique traits of the individual being examined. The genetic fingerprinting establishes the uniqueness and identity of

[13] Chaillet, J.R.; Vogt, T.F.; Beier, D.R.; and Leder, P. "Parental-Specific Methylation of an Imprinted Transgene is Established During Gamestogenesis and Progressively Changes During Embryogenesis." *Cell* 66(1991): 77-83. Surani, M.A.H.; Barton, S.C.; and Norris, M.L. "Nuclear Transplantation in the Mouse: Heritable Differences Between Paternal Genomes after Activation of the Embryotic Genome." *Cell* 45(1986): 127-136. Swain, J.L.; Stewart, T.A.; and Leder, P. "Parental Legacy Determines Methylation and Expression of a Cutosomal Transgene; A Molecular Mechanism for Paternal Imprinting." *Cell* 50(1987):719-727, at p. 719. Gilbert, S.F. ***Developmental Biology*** Sunderland, Mass.: Sinaver Associates Inc., 1985, at p. 61. Petitioner provides a helpful development of methylation. See, Pet. at 21 to 22.

each person from the earliest stages of the person's life after conception.[14]

The technologies of molecular biology have recently begun to find application in the detection of fetal abnormalities and fetal sex determinations through the analysis of the very small number of fetal cells that have found their way into the mother's bloodstream (about 1 cell in 10 to 100 million blood cells of the mother).[15] Using cell sorting technology (another post 1973 development) and DNA probe technology, scientists have been able to determine, for example, the presence of a growing boy or girl from a sample of

[14] Jeffreys, et al. *DNA Fingerprints and Segregation Analysis of Multiple Markers in Human Pedigrees*, Am. Journal of Human Genetics, 39:11-24 (1986); Honma, M., et al. *Application of DNA Fingerprinting to Parentage and Extended Family Relationship Testing*, Human heredity, 1990, 40:p356-362; Jeffreys, A.J., et al., *Principles and Recent Advances of Human DNA Fingerprinting*; DNA Fingerprinting: Approaches and Applications, edited by Jeffreys (1991). Jeffreys, A.J.; Brookfield, J.F.Y; and Semeonoff, R. "Positive Identification of an Immigration Test-Case Using Human DNA Fingerprints." *Nature* 317 (1985):818-819, at pp. 818-819. Honma, M.; and Ishiyama, I. "Application of DNA Fingerprinting to Parentage and Extended Family Relationship Testing." *Hum Hered* 40(1990): 356-362, at p. 356. Kovacs, B.W.; Shahbahrami, B.; Medearis, A.L.; and Comings, D.E. "Prenatal Determinations of Paternity by Molecular Genetic "Fingerprinting." *Obstet Gynecol* 75(1990): 474-478, at pp. 474-475.

[15] Price, J.O.; Elias, S.; Wachtel, S.S.; Klinger, K.; Dockter, M.; Tharapel, A.; Schulman, L.P.; Phillips, O.P.; Meyers, C.M.; Schook, D.; and Simpson, J.L. "Prenatal Diagnosis with Fetal Cells Isolated From Maternal Blood by Multiparameter Flow Cymetry" *Am J Obstet Gynecol* 165(1990): 1731-1737, at p. 1731.

4 ml of the mother's blood.[16]It is an established principle of human genetics and heredity that an individual human's cells all contain the same DNA composition (except for sperm and ovum cells)[17] so that the few fetal cells that have found their way into the mother's bloodstream demonstrate the presence of the unique human existing separately in the mother's womb.

The ability to detect genetic disorders before birth has improved dramatically during the last two decades.[18] The application of deoxyribonucleic acid (DNA) techniques to prenatal diagnosis of certain single gene disorders was first introduced in 1976.[19]

Another major advancement has been the use of chorionic villus sampling. It was only in 1982 that its potential use in determining

[16] Price, J.O.; Elias, S.; Wachtel, S.S.; Klinger, K.; Dockter, M.; Tharapel, A.; Schulman, L.P.; Phillips, O.P.; Meyers, C.M.; Schook, D.; and Simpson, J.L. "Prenatal Diagnosis with Fetal Cells Isolated From Maternal Blood by Multiparameter Flow Cytometry" *Am J Obstet Gynecol* 165(1990): 1731-1737, at p. 1731.

[17] Oppenheimer, S.B.; and Lefeure, G. Jr. *Introduction to Embryonic Development* Allyn and Bacon 1989. (pp. 20-60) at p. 53. Papalia, D.E.; and Okls, S.W. *A Child's World: Infancy Through Adolescence*. New York: McGraw-Hill, Inc., 1979, at p. 51.

[18] Hogge, W. A. "Chorionic Villus Sampling" In *The Unborn Patient* 2nd ed. edited by M.R. Harrison et al., 53-57. Philadelphia: W.B. Saunders Co., 1991, at p. 53.

[19] Boehm, C.D. and Kazazian, H.H. Jr., "Prenatal Diagnosis by DNA Analysis" In *The Unborn Patient* 2nd ed., edited by Michael R. Harrison et al., 82-91 at 82. Philadelphia: W.B. Saunders Company, (1991).

genetic disorders was realized. Due to the fact that trophoblastic tissue has the same "genetic constitution" as the fetus, a sample from the chorionic villi reflects the chromosomal, biochemical, and DNA status of the fetus. Therefore, the production of trophoblastic tissue is controlled by the DNA of the developing child and not that of the mother. This procedure uses tissue collected in the first trimester of life.[20]

The techniques involved in the generation of "in vitro" fertilization demonstrate that the child is a unique human being from conception. Before implantation the new human being is clearly separate from its mother. During the period after fertilization and before implantation, it has been possible to determine the sex of the child, whose development is started by a clear physical separation from the mother and father.[21] The preimplantation diagnosis of certain genetic diseases has also been considered a feas-

[20] Hogge, W.A. "Chorionic Villus Sampling" In *The Unborn Patient* 2nd ed. edited by M.R. Harrison et al., 53-57. Philadelphia: W.B. Saunders Co., 1991, at p. 53.

[21] Handyside, A.H.; Pattinson, J.K.; Penketh, R.J.A.; Delhanty, J.D.A.; Winston, R.M.L.; and Toddenham, E.G.D. 1989. "Biopsy of Human Preimplantation Embryos and Sexing by DNA Amplification." *Lancet* I (1989):347-349, at p. 348.

ible medical advance.[22] These procedures support the conclusion that pre-implanted human embryo is a genetically unique and complete human being.

The goal in the study of human embryo viability in synthetic culture medium is improved development and pregnancy success. Recently an embryo derived platelet activating factor was discovered, which when added to growth media, has dramatically increased the developmental and pregnancy potential of the embryo.[23] This chemical, a product of the new human, supports the conclusion that, even before implantation, there is an independent, unique human capable of producing substances that enhance its own survival.

The "fetus" is not "part of" a "woman's body." If it were the mother's body would control the child's genetic growth and development. Using modern molecular biology technology, not available in the 1970's, it has been found that by the third cell division

[22] Monk, M.; and Holding, C. "Amplification of a Beta-Haemoglobin Sequence in Individual Human Oocytes and Polar Bodies." *Lancet* 335(1990): 885-987, at 985.

[23] O'Neill, C. "A Consideration of the Factors Which Influence and Control the Viability and Developmental Potential of the Preimplantation Embryo." *Baillieres Clin Obstet Gynaecol* 5(1991): 159-178.

after fertilization control of growth and development has been established by the new human's DNA.[24]

In 1981 the Subcommittee on Separation of Powers of the Judiciary Committee of the United States Senate conducted extensive hearings on the question of when life began based upon the knowledge of science at that time. The committee concluded:

> ...Life of a human being begins at conception ... today the facts are beyond dispute ... physicians, biologists and other scientists argue that conception marks the beginning of the life of a human being ... there is overwhelming agreement on this point in countless medical, biological, and scientific writings.[25]

There simply is no credible evidence to refute this conclusion.

II. BASED ON NEW SCIENTIFIC AND MEDICAL INFORMATION A CHILD EXPERIENCES PAIN DURING ABORTION EVEN AS EARLY AS EIGHT WEEKS AFTER CONCEPTION.

Studies being conducted as a result of the availability of new technology has resulted in data and information which supports the conclusion that the unborn child is subjected to great pain during an abortion, and the child experiences pain as early as eight weeks after conception.

A. The New Technology

[24] Telford, N.A.; Watson, A.J.; and Schultz, G.A. "Transition From Maternal to Embryonic Control in Early Manmalian Development: A Comparison of Several Species." Molecular Reproduction and Development 26(1990): 90-100, at 92.

[25] Report on Human life Bill, Subcommittee on Separation of Powers, Committee on the Judiciary United States Senate (97th Cong., 1st Sess. 1981) p. 7.

Development of techniques of monoclonal antibody production, first described in 1975 using mouse material and then further developed to allow the production of specific human antibodies in the early 1980's[26], has complemented DNA and RNA studies which are the subject of Molecular Biology, by allowing for the specific detection and location of individual proteins or peptides in a human cell sample.

The use of monoclonal antibody technology[27], as well as recent developments in modern protein chemistry and electrophysiology, are being applied to questions relevant to human developmental neurobiology. Initially applied in the mid 1980's, the new techniques was recognized as having the potential to revolutionize our understanding of the human nervous system at it's inception. Scientists recognized that with the new technology they could investigate nervous system function and development at the molecular or chemical level, no longer limited to observations of the

[26] Martinis, J.; David, G.S.; Bartholomew, R.M.; and Wang, R. "Novel Applications of Monoclonal Antibodies." In *Basic Biology of New Development* In *Biotechnology* In *Basic Life Sciences* 25(1983): 129-154, at pp. 129-130. Cole, S.C.P.; Campling, B.G.; Atlaw, T.; Kozbor, D.; Roder, J.C. "Human Monoclonal Antibodies." *Mol Cell Biochem* 62 (1984): 109-120, at p. 109.

[27] Campbell, A.M. "Monoclonal Antibody Technology" In *Laboratory Techniques and Biochemistry and Molecular Biology*, edited by R.H. Burdon and P.H. Van Knippenberg. Eisevier (Amsterdam), 1985

histological presence of nerves and other gross functionality. From the start this technological application showed that the classical histological and functional criteria for defining (nerve) cell types was oversimplified.[28]

One result was the detection of some 30 neuropeptides (or nerve hormones) directly involved in the functioning nervous system of the human body. The presence of peptides (the hormones) of the endocrine system were known in 1973; but since 1973 similar substances have been found to be present in nerve fibers. This discovery was described in 1985 as a recent and revolutionary discovery.[29] These neuropeptides function as neurotransmitters and neuromodulators which are located at axon terminals at synapses throughout human tissue. Two important neuropeptides are substance P (the chemical messenger of pain) and enkephalin (a neurotransmitter involved in pain perception).[30] The detection of

[28] Fischbach, G.D. "An Introduction to Molecular Approaches in Studies of Neuronal Development and Synapse Formation." In *Molecular Neurobiology* In *Neurology and Psychiatry*, edited by M.D. Erich, R. Kandel. New York: Raven Press, 1987.

[29] Ballesta, J.; Bloom, S.R.; and Polak, J.M. "Distribution and Localization of Regulatory Peptides." *Crit Rev Clin Lab Sci* 22(1985):185-218, at pp. 185-186.

[30] Clark, J., ed. *The Nervous System: Circuits of Communication. The Human Body*. Torstar Books, Inc., 1985, at pp. 152-154.

these two neuropeptides in samples of human tissue has been used as a convenient way to define and locate nervous system development and function in the human being from the time of conception. In 1985, the study of neuropeptides was still in its infancy. Due to accelerated pace of study however, it disclosed a very complex process of interacting peptides, neurons, and ion channels which play an important role in the detection and transmission of sensation in the human. Their discovery was a direct result of new immunocytochemical techniques used in conjunction with radioimmunoassay, neither of which were available in the 1970's.

The crude ultrasound devices that were available in the early 1970's permitted limited access to knowledge of a child during the early stages of growth. "Real time ultrasound" was developed in 1976 and actually created a motion picture which could depict movement and function such as breathing, urination, swallowing and other functions of the human existence. This level of visualization permits diagnosis of the child's illnesses while in its mother's womb. Medicine can now watch how the child functions including such intricate detail as the operation of the tiny little valves of the heart as it flops up and down pushing blood.

Abnormalities in things such as heart valves can be detected and rather sophisticated operations are currently performed on unborn children at four to five months.[31]

First pioneered in 1981, fetal surgery has made dramatic advances. During fetal surgery, both mother and child are anesthetized, the mother's abdomen surgically opened and the uterus incisioned. While still attached to the umbilical cord, amniotic fluid is drained off, and "the surgeon removes the fetus' left arm from the uterus and attaches specially designed fetal monitors."[32] These fetal monitors are for ECG, transcutaneous oxygenation, and temperature readings. The baby is incised surgically, repaired, and is placed back into the mother's uterus. The uterus is filled with warm lactated Ringer's solution and prophylactic antibiotics to replace any lost amniotic fluid.[33] Fetal heart rate and oxygen saturation monitoring is a norm in these

[31] See, Nathanson at A-121 to A-122.

[32] Levine, A.H. "Fetal Surgery." *Aorn*, 54(1991): 17-19, 22-27, 30-32, at p. 30.

[33] Levine, A.H. "Fetal Surgery." *Aorn*, 54(1991): 17-19, 22-27, 30-32, at p. 30. Nathanson at 52a.

procedures.[34] Some defects that might require this procedure include urethral obstruction, congenital diaphragmatic hernia, fetal chylothorax, sacrococcygeal teratoma (a fetal tumor).[35] After surgery, the child can proceed through pregnancy to, at, or near full term.[36] During the fetal surgery the baby is treated like an adult patient, and must be anesthetized.

B. Assumptions About Pain.

Since the time of *Roe v. Wade* there have been a number of generally accepted assumptions about human neurological development and our ability to feel pain that have been refuted. The first assumption was that neonates were incapable of feeling pain.[37] The second assumption was that myelinated nerve fibers were necessary for pain perception, and since they did not form completely until after birth pain perception was a late develop-

[34] Harrison, M.R.; Langer, J.C.; Adzick, N.S.; Golbus, M.S.; Filly, R.A.; Anderson, R.L.; Rosen, M.A.; Callen, P.W.; Goldstein, R.G.; and deLorimier, A.A. "Correction of Congenital Diaphragmatic Hernia In Utero, V. Initial Clinical Experience." J Pediatric Surg 25(1990):47-57, at p. 49.

[35] Harrison, M.; and Adzick, N.S. "The Fetus as a Patient." *Ann Sur* 213(1991): 279-291, at p. 281.

[36] Strickland, R.A.; Oliver, W.C.; Chantigian, R.C.; Ney, J.A.; and Davidson, G.K. "Anesthesia, Cardiopulmonary Bypass, and the Pregnant Patient." *Mayo Clin Proc* 66(1991): 411-429, at p. 413. Nathanson at 46a.

[37] Porter, F. "Pain in a Newborn," *Neonatal Neurology, Clinics in Neonatology*, 16(2) p. 549 et seq. (1989).

mental event. The third assumption was that pain experience required pain detecting nerves connected to the thalamus and then to the brain cortex; there was presumed to be a period of cortical maturation necessary before pain could be experienced. All of these assumptions were based upon gross histological observations. Those making such assumptions did not know about neuropeptides, their detection and function. They also did not have available the modern methodologies and techniques developed in the last decade.

Only recently has it been understood that even normal neonates feel pain.[38] At the time of *Roe*, had been assumed by the medical community that a fully developed and mature cortical brain region was necessary for pain perception. This assumption, it became clear, was inconsistent with the observations of those who cared for premature infants.[39]

[38] Fitzgerald, M.; and McIntosh, N. "Pain and Analgesia in the Newborn." *Arch Dis Child* 64(1989): 441-443, at p. 441.

[39] One of whom stated eloquently,

"It has generally been assumed that the ability of a child to feel pain increases with age and that neonates may not perceive pain or may perceive it only minimally. Assumed by whom? Certainly not by those of us at the bedside of critically ill infants, who see them flinch from procedures, startle in response to loud noises, and turn from bright lights and various other forms of stimulation. Not by those who have heard infants' anguished cries and seen their vigorous withdrawals from painful stimuli. Not by those who have observed their increased heart and respiratory rates and profuse sweating in

Biochemical studies supported the observations of care givers concerning pain experiences. Studies on unborn and premature infants showed much earlier developmental time when pain was experienced. Detailed hormonal studies in preterm neonates undergoing surgery under minimal anesthesia have shown marked release of catecholamines, as well as autonomic nervous stimulation, heart rate changes, increased hormonal activity and increased motor activity. These activities are consistent with stress experienced with pain.[40] It has been documented that endocrine and metabolic responses associated with pain are abolished by giving anesthesia to preterm neonates[41], and to the fetus.[42]

C. The Need to Relieve Pain During Fetal Surgery.

response to heel sticks or circumcision. And finally, not by those who have seen babies gasp for every breath as they die from incurable lung disease." Fletcher, A.B. "Pain in the Neonate." *N Eng J Med* 317(1987): 1347-1348, at p. 1347.

[40] Rosen, M.A., *Anesthesia for Procedures Involving the Fetus* (1991), Seminars in Perinatology 15:410-417.

[41] Scanlon, J.W.; "Appreciating Neonatal Pain." *Adv Pediatr* 38(1991): 317-333, at p. 320. Rosen, M.A. "Anesthesia for Procedures Involving the Fetus." *Semin Perinatol* 15(1991): 410-417, at p. 431.

[42] Levine, A.H. (1991), Fetal Surgery, *Aorn J*, V54(1): 16-19, 22-27, 30-32, at p. 27. Rosen, M. "Anesthesia and Monitoring for Fetal Intervention" In *The Unborn Patient* 2nd ed., (1991), Harrison (editors), W.B. Saunders Co. p. 176, at p. 176.

Since 1981, the field of fetal surgery developed dramatically. It is common practice to monitor fetal vital signs and to give the fetus anesthesia.[43] "Although the mother is anesthetized for fetal surgery, the fetus becomes the prime target for the anesthesia."[44] "For fetal surgery, unlike maternal surgery, the fetus is not an innocent bystander for whom we attempt the least anesthetic interference. Instead, the fetus is the primary patient, requiring safe administration of anesthesia and close monitoring of anesthetic effects to ensure well being."[45] Studies indicate that performing surgery on unanesthetized fetuses results in automic

[43] Levine, A.H. "Fetal Surgery." *Aorn J*, 54(1991): 17-19, 22-27, 30-32, at p. 30. Harrison, M.R.; Adzick, N.S.; Longuker, M.T.; Goldberg, J.D.; Rosen, M.A.; Filly, R.H.; Evans, M.I.; and Golbos, M.S. "Successful Repair in Utero of a Fetal Diaphragmatic Hernia After Removal of Herniated Viscera from the Left Thorax." *N Eng J Med* 322(1990): 1582-1584, at p. 1582. Strickland, R.A.; Oliver, W.C.; Chantigian, R.C.; Ney, J.A.; and Davidson, G.K. "Anesthesia, Cardiopulmonary Bypass, and the Pregnant Patient." *Mayo Clin Proc* 66(1991): 411-429, at pp. 414-415. Longaker, M.T.; Golbus, M.S.; Filly, R.A.; Rosen, M.A.; Chang, S.W.; and Harrison, M.R. "Maternal Outcome After Open Fetal Surgery." *JAMA* 265(1991): 737-741, at p. 737. Harrison, M.R.; Golbus, M.S.; Filly, R.A.; Anderson, R.L.; Flake, A.W.; Rosen, M.; and Huff, R.W. "Fetal Hydronephrosis: Selection and Surgical Repair." *J Pediatr Surg* 22(1987): 556-558, at p. 556. Rosen, M. "Anesthesia and Monitoring for Fetal Intervention" In *The Unborn Patient* 2nd ed., edited by M.R. Harrison 172-181. Philadelphia: W.B. Saunders Co., 1991, at p. 176; Strickland, supra, at 411.

[44] Levine, A.H. "Fetal Surgery." *Aorn J*, 54(1991): 17-19, 22-27, 30-32, at p. 27. See also, Strickland, supra, at p. 411.

[45] Rosen, M. "Anesthesia and Monitoring for Fetal Intervention" In *The Unborn Patient* 2nd ed., edited by M.R. Harrison 172-181. Philadelphia: W.B. Saunders Co., 1991, at p. 176.

nervous system stimulation, increased hormonal activity, increased motor activity, and variations in heart rate.[46] Anesthesia is used in fetal surgery on children as young as 18 weeks gestation.[47]

D. Non Myelinated Nerve Fibers Transmit Pain.

Until recently pain perception was presumed to require myelinated[48] nerve fibers[49] (present later in development). It has also been shown that this is not necessarily the case even in adults.[50] Both myelinated and unmyelinated nerve fibers transmit pain.[51] Most fibers of the nervous system of a newborn full term infant are not myelinated until two years after birth when the

[46] Levine, A.H. "Fetal Surgery." *Aorn J*, 54(1991): 17-19, 22-27, 30-32, at p. 27. Rosen, M. "Anesthesia and Monitoring for Fetal Intervention" In *The Unborn Patient* 2nd ed., edited by M.R. Harrison 172-181. Philadelphia: W.B. Saunders Co., 1991, at p. 176.

[47] Harrison, M.; and Adzick, N.S. "The Fetus as a Patient." *Ann Sur* 213(1991): 279-291, at p. 281.

[48] Myelin is the fatty substance that makes up the sheath around many nerve fiber.

[49] Clark, J., ed. *The Nervous System: Circuits of Communication. The Human Body*. Torstar Books, Inc., 1985, at p. 153.

[50] Anand, K.J.S.; and Hickey, P.R. "Pain and Its Effects in the Human Neonate and Fetus." *N Engl J Med* 317(1987): 1321-1329, at p. 1322. Casey, K.L. "Neural Mechanisms of Pain: An Overview." *Acta Anaesthesiol Scand* Suppl 74(1982): 13-20, at 13.

[51] Anand, K.J.S.; and Hickey, P.R. "Pain and Its Effects in the Human Neonate and Fetus." *N Engl J Med* 317(1987): 1321-1329, at 1322.

spinal cord, brainstem, and cerebellum are finally myelinated.[52] Myelin is not needed to conduct impulses over the nonmyelinated fibers, but the non-myelinated fibers conduct slower than myelinated ones (but in an infant who is physically smaller than an adult, the impulses do not have as far to travel.)[53] "Even when mature, most peripheral pain fibers are unmyelinated or, at best, thinly myelinated, lack of myelination therefore cannot be used as a valid argument to deny pain appreciation in the newborn."[54] A recent analysis of pain experiences in adults reached the conclusion that the classical view of the nervous system as a hard wired system projecting from nociceptors (pain detecting nerves) to the thalamus and then to the cortex cannot explain all pain experiences.[55]

[52] Clark, J., ed. "The Nervous System: Circuits of Communication." *The Human Body*. Torstar Books, Inc. (1985).

[53] Clark, J., ed. *The Nervous System: Circuits of Communication. The Human Body*. Torstar Books, Inc., 1985, p. 109.

[54] Scanlon, J.W.; "Appreciating Neonatal Pain." *Adv Pediatr* 38(1991): 317-[54]333, at p. 320.

[55] Wall, P.D. "The Biological Function and Dysfunction of Different Pain Mechanisms." In *Advances in Pain Research and Therapy*. Edited by F. Sicuteri, (10:19-28). New York: Raven Press, 1992, at p. 19.

E. It is Now Known that Full Cortical Development Is Not Necessary for the Child to Experience and Respond to Pain Prior to Birth.

Science no longer accepts the assumption that cortical involvement is necessary for pain detection.[56] Evidence to support the premise that pain can be experienced by children before 23 weeks gestation comes from the early detection of pain associated chemicals; the timing of nerve development; the observation of fetal behavior and the characterization of full term infants with anencephaly. The discovery of neuropeptides and their function as nerve impulse transmitters and modulators was totally unknown at the time of *Roe v. Wade* and is recognized as revolutionary.[57]

For the existence of pain there presumably has to be an event and detection of that event outside the brain region. It is a very important and recent observation, that, using immunohistochemistry techniques, substance "P" positive neurons and nerve fibers were detected at eleven weeks post fertilization,

[56] Boreus, L.O. "Pain in the Newborn - Pharmacodynamic Aspects." Dev. Pharmacol Ther 15(1990): 142-148, at p. 144. See also discussion at p. 71-73.

[57] See the discussion of the role of neuropeptides in pain transmission found in Petition at A-31 to A-33.

and enkephalin positive neurons and nerve fibers were detected at thirteen weeks post fertilization. The levels of substance "P" and enkephalin at twelve to fourteen weeks were comparable to levels of the full term baby. In 1990, as a result of this revelation using molecular biological techniques, researchers have stated that:

> "the importance of the early appearance of enkephalin and substance "P" neurons and fibers of the pain pathways in the major subnuclei connecting with the cardiovascular, gastrointestinal and respiratory functions in the human has to be stressed." [58]

None of the significant techniques used in the cited study were available in 1973 or significantly thereafter. Others have found Substance "P" present as early as five weeks gestation and has been detected at all stages of development wherever examined from that point thereafter.[59]

[58] Yew, D.T., et. al. *Development and Localization of Enkephalin and Substance P in the Nucleus of the Tractus Solitarius in the Medulla Oblongata of Human Fetuses,* Neuroscience 34(1990) p.491-498, at p. 491.

[59] Tam, P.K.; and Lister, J. "Maldevelopment of Spinal Cord - Substance P in Spina Bifida." *Z Kinderchir* 41(1986): 206-208. Wadhwa, S.; Rizvi, T.A.; and Bijiani, V. "Substance P-Immunoreactivity in the Developing Human Retinogeniculate Pathway." *Neurosci Lett* 89(1988): 25-30, at p. 25. Paulin, C.; Charnay, Y.; Chayvialle, J.A.; Daniere, S.; and Dubois, P.M. "Ontogeny of Substance P in the Digestive Tract, Spinal Cord and Hypothalamus of the Human Fetus." *Regul Pept* 14(1986): 145-153, at p. 145.

In the last six years modern science has examined the relationship of substance P and pain.[60] It has been found that substance "P" (a neuropeptide), an important excitatory transmitter of pain pathways, is clearly present in the human at five weeks post fertilization.[61] Nervous system development (and function) occurs well before 28 weeks gestation.

If a neocortex is needed for pain detection, then the fact that neocortex development begins at eight weeks gestation in the fetus and has all its neurons by twenty weeks is pertinent.[62] Some may assume that a degree of cortical maturity is necessary for pain perception. That assumption led physicians to presume that newborns did not feel pain when Roe v. Wade was decided. Clearly, that assumption was wrong.

[60] Uddman, R.; Edvinsson, L.; Jansen, I.; Stiernholm, P.; Jensen, K.; Olesen, J.; and Sunder, F. "Peptide-Containing Nerve Fibers in Human Extracranial Tissue: A Morphological Basis for Neuropeptide Involvement in Extracranial Pain?" *Pain* 27(1986): 391-399.

[61] Luo, C.B.; Zheng, D.R.; Guan, Y.L.; and Yew, D.T. "Localization of Substance P and Enkephalin by Immuno histochemistry in the Spinal Cord of the Human Fetus." *Neuroscience* 27(1988): 989-993, at p. 989.

[62] Marin-Padilla, M. "Structural Organization of the Human Cerebral Cortex Prior to the Appearance of the Cortical Plate." *Anat Embryol* 166(1983): 21-40, at p. 21.

Until recently, science was incapable of even formulating questions no less deriving answers concerning the role of chemicals in the transmission of pain. In fact, science had not even discovered the existence of most of those key chemicals when *Roe v. Wade* was determined. In the absence of knowledge concering pain transmitting chemicals those deciding upon what is needed for pain transmission requiree evidence for a physical structure such as dendritic spines to "determine" where pain transmission is possible. The presence of pain transmitting chemicals before the presence of such physicla structures makes pain transmission possible at an earlier gestational time. A recent review (1991) summarized the current state of understanding of the function and development of the brain in the developing human.[63]

[63] Lagercrantz, H.; and Forssberg, H. "Functional Development of the Brain in the Fetus and the Infant." *Lakartidningen* 88(1991): 1880-1885. "Neuronal multiplication occurs mainly from the tenth to twentieth gestational weeks, after which no new nerve cells are formed, though neuronal arborization and the information and reorganization of synapses continues until adulthood ...Somatosensory functions are developed at an early stage. The pain threshold is assumed to be lower in the fetus than in the adult. In man general fetal movements appear from the eighth gestational week and more complex movements such as sucking, swallowing and breathing during the tenth to twelfth gestational weeks. These movements are generated by neuronal networks." Lagercrantz, *supra*, 1991 at 1880-5.

Using modern techniques that were used to identify different types of nerve synapses, as well as different types of neurotransmitters, in samples taken from 8 to 37 week old fetus[64] it is concluded that the morphological substrate for nociception (pain detection) in the spinal cord exists at very early developmental stages in man. As early as the end of the 1st trimester, the thalamus, third ventricle, midbrain, brain stem, and cerebellar hemispheres are developed and their appearance, besides physical size, will go unchanged throughout the rest of fetal development.[65] Independently, others have also observed many of the important parts of the puzzle early on in development. At seven weeks gestation cutaneous sensory receptors appear in the fetus. This development is preceded by the development of synapses or junctions between sensory nerve fibers and interneurons of the spinal cord.[66] A basic sensory response loop is present extremely early in human development. It is noteworthy

[64] Rizvi, T.; Wadhwa, S.; and Bijiani, V. "Development of Spinal Substrate for Nociception" *Pain 4(1987-suppl.): S195.*

[65] Filly, R.A. "Sonographic Anatomy of the Noraml Fetus" In *The Unborn Patient* 2nd ed., edited by M.R. Harrison et al., 92-130, Philadelphia: W.B. Saunders Co., 1991, at p. 122.

[66] Anand, K.J.S.; and Hickey, P.R. "Pain and Its Effects in the Human Neonate and Fetus." *N Engl J Med* 317(1987): 1321-1329, at p. 1322.

that, with ultrasound, we can observe movement by the fetus away from outside stimulation by the eighth week.[67] Brain activity, as detected by electroencephalography, is also present at eight weeks gestation.[68] Nature in its wise way prepares the nervous system first so that all the other systems can develop and function as they should.[69] A basic sensory response loop is clearly present shortly after eight weeks gestation. This fact is scientifically logical since pain detection and response to pain are very important parts of a human's ability to survive.

It was recently discovered that many behaviors characteristic of newborns are clearly present in children with anencephaly (children born without a developed cortex).[70] Previously, these behaviors had erroneously been ascribed to cerebral hemispheric activity[71]

[67] Flower, M.J. "Neuromaturation of the Human Fetus." *J Med Philos* 10(1988): 237-351.

[68] Goldenring, J.M. "Development of the Fetal Brain." *N Engl J Med* 307(1982): 564, at p. 564; Flower, M.J., *supra*.

[69] Kalvger, G.; and Kalvger, M.F. Human Development: *The Span of Life*. St. Louis: The C.V. Mosby Company, 1974, at p. 35.

[70] The Medical Task Force on Anencephaly, (Stumpf, D.A., et al.) "The Infant with Anencephaly" *N Eng J Med* 322(1990): 669-674.

[71] Id.

(including activity described in the defendant's brief as needed for neocortical reception of body sensations).

Anencephalic children are born without a cerebral cortex.[72] Their expected post birth lifespan ranges from a few hours to a few months.[73] During their post birth lives these children breath spontaneously and have a grasp response.[74] They respond to noxious stimuli known to cause pain by avoidance, by withdrawal and by crying.[75] They breath, cough, hiccup, smile, grimace, yawn and suck. In a recent study of twelve anencephalic infants, all twelve responded to pain, all had an exaggerated sustained response to touch, all twelve evidenced spontaneous movement,

[72] Shewmon, D.A.; Capron, A.M.; Peacock, W.J.; and Schulman, B.L. "The Use of Anencephalic Infants as Organ Sources: A Critique." *JAMA* 261(1989): 1773-1781.

[73] Stumpf, D.A., Chair of Medical Task Force on Anencephaly "The Infant With Anencephaly." *N Eng J Med* 322(1990): 669-674.

[74] Ashwal, S.; Peabody, J.L.; Schneider, S.; Tomasi, L.G.; Emery, J.R.; and Peckham, N. "Anencephaly: Clinical Determination of Brian Death and Neuropathologic Studies." *Pediatr Neurol* 6(1990): 233-239.

[75] Stumpf, D.A., Chair of Medical Task Force on Anencephaly. "The Infant With Anencephaly." *N Eng J Med* 322(1990): 669-674. Shewman, D.A.; Capron, A.M.; Peacock, W.J.; and Schulman, B.L. "The Use of Anencephalic Infants as Organ Sources: A Critique." *JAMA* 261(1989): 1773-1781. Van Assche, F.A. "Anencephalics as Organ Donors." *Am J Obstet Gynecol* 163(1990): 599-600. Ashwal, S.; Peabody, J.L.; Schneider, S.; Tomasi, L.G.; Emery, J.R.; and Peckham, N. "Anencephaly: Clinical Determination of Brain Death and Neuropathologic Studies." *Pediatr Neurol* 6(1990): 233-239.

and all twelve breathed spontaneously.[76] Additionally, seven of the twelve responded to a stimulation at their mouth towards the stimulus (rooting response) and seven of the twelve had a sucking response.[77] Spontaneous movement in the fetus begins between six and seven and one-half weeks gestation.[78] Stimulation of the mouth area resulting in a response towards the stimulus is seen in the child at 9 weeks gestation and sucking is present at 11 weeks gestation.[79] Based upon these behaviors and their incidence in this study, one must conclude that the fetus at 6 to 11 weeks gestation is neurologically developed to a point at least equivalent to the twelve anencephalic children described above. They are all capable of experiencing pain.

In conclusion, the biochemical evidence, unforeseen and unavailable in 1973, supports the very early development of pain

[76] Ashwal, S.; Peabody, J.L.; Schneider, S.; Tomasi, L.G.; Emery, J.R.; and Peckham, N. "Anencephaly: Clinical Determination of Brain Death and Neuropathologic Studies." *Pediatr Neurol* 6(1990): 233-239.

[77] *Id.*

[78] de Vries, J.I.P.; Visser, G.H.A.; and Prechtl, H.F.R. "The Emergence of Fetal Behavior. I. Qualitative Aspects." *Early Hum Dev* 7(1982): 301-322. Flower, M.J. "Neomaturation of the Human Fetus." *J Med & Phil* 10(1985): 237-251.

[79] Flower, M.J. "Neomaturation of the Human Fetus." *J Med & Phil* 10(1985): 237-251.

detection in the fetus. This evidence is consistent with observed fetal behavior (using real time ultrasound), which shows the fetus moving away from painful stimuli at 8 weeks gestation. Modern instrumentation picks up brain wave activity also at 8 weeks gestation. Together these observations point to an active sensory system present and functioning in the fetus at 8 weeks gestation. Finally, the recent studies on full term anencephalic infants reveal these infants to be neurologically comparable to 6-11 week old fetuses. All of these infants are capable of experiencing pain.

CONCLUSION

There is a scientific consensus that a unique human life begins at conception. Scientific evidence, unavailable until very recently demonstrates that pain is experienced as early as eight weeks gestation. Abortion results in the painful death of a unique human being, whose life is irreplaceable.

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